92-1284

Supreme Court, U.S.
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No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
Petitioner,

v.

BANK ONE, TEXAS, N.A. and
FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBANK HOUSTON, N.A.
and THE DEPOSIT INSURANCE BRIDGE BANK, N.A.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the doctrine of sovereign immunity shield the FDIC, as receiver for an insolvent national bank, from a judgment for punitive damages signed prior to the appointment of the receiver?

2. Is the receivership estate of an insolvent national bank liable for punitive damages awarded in a judgment signed prior to the appointment of the receiver?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Suzan E. Taylor d/b/a Exploration Services ("Taylor"), files this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and asks the Supreme Court to vacate that portion of the judgment of the court of appeals reversing the trial court's judgment for punitive damages, to render judgment for Petitioner on the questions presented, and to remand the case to

the trial court for implementation of the remainder of the judgment of the court of appeals.

OPINION BELOW

The opinion of the court of appeals (App. A) is reported at 970 F.2d 16 and was dated August 18, 1992.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on August 18, 1992. The court of appeals granted on August 26, 1992, Taylor's motion to extend the time for filing a petition for rehearing to September 15, 1992. App. C. Taylor's petition for rehearing was timely filed on September 15, 1992, and was overruled on November 10, 1992. App. D. The Supreme Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) (West Supp. 1992).

STATEMENT

A mutually profitable banking relationship between MBank Houston, N.A. ("MBank"), and Taylor came to an end when MBank improperly froze her accounts, accelerated her loans, and wrongfully foreclosed on collateral securing some of her loans. That banking relationship and the circumstances of its demise were examined closely by a jury impaneled in the 152nd Judicial District Court, in Harris County, Texas, to hear MBank's suit for the collection of two past due loans and Taylor's lender liability counterclaims. After six weeks of trial the jury's verdict was a complete victory for Taylor.

On February 27, 1989, the trial court entered judgment against MBank and in favor of Taylor for $9,639,841.65. That sum included actual damages of $2,585,000, prejudgment interest on the actual damages of $1,313,891.23, exemplary damages of $5,264,000, attorneys' fees of $675,000, and an offset of $198,049.58 for principal and interest due on the two loans. App. B.

MBank took the first step toward appealing the adverse judgment by filing a motion for new trial and a motion to modify, correct, or reform the judgment on March 29, 1989, one day after MBank was declared insolvent and the FDIC was appointed as its receiver. The case was removed to federal district court on April 26, 1989, where the post-verdict motions that had been filed in state court were reurged by the FDIC. Those motions were overruled.

The FDIC and Bank One, Texas, N.A., a successor in interest to MBank, appealed. The court of appeals affirmed the trial court's judgment on the merits, affirmed the actual damages awarded, reversed and rendered Taylor's judgment for punitive damages, and remanded the case to the trial court for a hearing to determine whether Bank One was entitled to attorneys' fees in connection with one of the unpaid promissory notes and to issue a final judgment including interest and costs. The reversal of the punitive damage award was predicated on the unprecedented holding that the appointment of the FDIC as the receiver for an insolvent national bank converted a prior judgment against that bank into a judgment against the United States.

REASONS FOR GRANTING THE WRIT

The FDIC has become one of the nation's most active litigants as the number of bank failures has accelerated during the past five years. That agency appears in court as one or both of two incarnations: FDIC, corporate; and FDIC, receiver. *First Empire Bank v. FDIC*, 572 F.2d 1361, 1364 (9th Cir.), *cert. denied*, 439 U.S. 919 (1978). In its corporate capacity, the FDIC represents its own interests as an agency of the United States. *See id.* In its capacity as receiver, the FDIC represents the interests of the creditors and shareholders of an insolvent bank. *FDIC v. Wright*, 963 F.2d 75, 77 (5th Cir. 1992); 3 *Michie on Banks & Banking*, Ch. 6 § 96 at 246-47 (W.M. Willson, et al. eds. 1974).

The distinction between the FDIC's corporate and receivership capacities is one that has, with the exception of the decision below, been consistently recognized by the federal courts. *See Texas Am. Bancshares, Inc. v. Clarke*, 954 F.2d 329, 331 (5th Cir. 1992); *Thurman v. FDIC*, 889 F.2d 1441, 1443-44 (5th Cir. 1989); *First Empire Bank*, 572 F.2d at 1361. It is a distinction that the FDIC regularly makes when it administers failed banks. And it is a distinction that the court below ignored when it ruled that sovereign immunity precluded Taylor from recovering punitive damages from the FDIC as receiver for MBank. App. A-40.

A. The FDIC, as receiver, is not the sovereign and is not immune from suits against the receivership estate.

Claims against the FDIC, as receiver, are not claims against the sovereign. When the FDIC acts as a receiver, it administers the receivership estate. *Wright*, 963 F.2d at 77. The assets of the insolvent bank are marshalled to satisfy the claims of legitimate creditors of that bank. *Id.* The claims made by such creditors are claims against the insolvent bank and are not claims against the United States. *Id.*; *FDIC v. Bernstein*, 786 F. Supp. 170, 181 (E.D.N.Y. 1992); *cf. Gray v. Grand Trunk W. Ry.*, 156 F. 736 (7th Cir.), *cert. denied*, 207 U.S. 594 (1907) (railroad receivership); Ralph E. Clarke, 2 *A Treatise on the Law & Practice of Receivers*, Ch. 14, § 422 at 708 (3d Ed. 1959).

Disregarding the well-settled law of receiverships, the court of appeals focused on the FDIC's status as a federal agency and raised the bar of sovereign immunity against Taylor's punitive damage claim. App. A-37--A-40. The court quoted the opinion in *Dugan v. Rank*, 372 U.S. 609, 620 (1963), to support its decision to invoke sovereign immunity:

> Even if the United States was not named as a party in the original action, "if the judgment sought would expend itself upon the public treasury or domain, or interfere with public administration, . . . or if the effect of the judgment would be to restrain the government from acting, or to compel it to act . . .," the suit will be construed as one

> against the United States requiring a waiver of sovereign immunity.

App. A-37.

The facts in *Dugan* were altogether different from those of the instant case. Plaintiffs in *Dugan* sued a government official and asked for an order requiring the Bureau of Reclamation to alter a water project. Taylor sued MBank to recover for various torts committed by that bank. Her judgment was against that bank and not against the assets of the United States. *See Wright*, 963 F.2d at 77; *Bernstein*, 786 F. Supp. at 181.

The sovereign immunity defense would not be available to the FDIC even if the receiver distributes insurance funds from FDIC corporate to MBank's creditors.[1] *Far W. Fed. Bank, S.B. v. Office of Thrift Supervision*, 930 F.2d 883, 890 (Fed. Cir. 1991). Funds that are in the possession of a public corporation and are thus severed from treasury funds and treasury control are not considered to be public funds for purposes of the sovereign immunity doctrine. *Id.* This is true even if the segregated funds are replenished from time to time by funds from the United States Treasury. *Id.*

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1. If the receiver does not make a ratable distribution to the bank's creditors, the funds of FDIC corporate may be used to pay those creditors who were not treated equally. First Empire Bank, 572 F.2d at 1369-71.

B. A post-judgment declaration of insolvency does not affect the liability of the receivership estate.

The FDIC did not even urge sovereign immunity as a bar to Taylor's punitive damage judgment when it argued the post-verdict motions which had been filed by MBank. Neither the memoranda filed by the FDIC to support the motions nor the cases cited in those pleadings mention the words "sovereign immunity." Although those two words finally appeared in the brief the FDIC filed in the court of appeals, the thrust of the FDIC's arguments in that court were the same as those proffered in the district court -- punitive damages should not, as a matter of fairness to other creditors, be awarded against the receiver of a closed bank.

Whatever merit the FDIC's policy arguments against punitive damages might have with respect to a case tried after the FDIC's appointment as receiver,[2] such arguments have no merit in this case where the judgment was signed prior to the receiver's appointment. The rights and obligations of an insolvent bank are fixed as of the time that the bank is declared to be insolvent. *United States v. Knox*, 111 U.S. 784, 786-87 (1884); *Wright*, 963 F.2d at 77; *American Nat'l Bank v. FDIC*, 710 F.2d 1528, 1540 (11th Cir. 1983); *FDIC v. Grella*, 553 F.2d 258, 262 (2d Cir. 1977). The receiver thus takes the bank's liabilities as they are at the time of insolvency. If this were not the rule, the ratable distribution mandated

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2. *See Summers v. FDIC*, 592 F. Supp. 1240 (W.D. Okla. 1984); *Professional Asset Management, Inc. v. Penn Square Bank, N.A.*, 566 F. Supp. 134 (W.D. Okla. 1983).

by statute (12 U.S.C.A. § 194 (West 1989)) could not occur because the dollar value of the bank's assets and liabilities would fluctuate according to post-insolvency events.[3] In the instant case, the punitive damages were awarded against MBank and not the receiver. Those damages were a liability of the receivership estate subject only to their reversal on appeal. MBank was solvent and in business when the jury imposed punitive damages as punishment for its treatment of Taylor and as a deterrent to future misconduct. MBank continued to operate as a going concern when the jury's verdict was reduced to judgment. After insolvency, that judgment was a claim payable from MBank's assets unless the receiver convinced an appellate court that the punitive damages were undeserved or too severe. The FDIC did not even try to carry that burden on appeal.

A final judgment cannot be set aside simply because a bank was later declared to be insolvent. That, however, is precisely what the FDIC has accomplished in this case. The court of appeals has reversed a punitive damages award because the FDIC was appointed receiver after the judgment was signed. That decision is inconsistent with the weight of authority regarding the availability of the special *D'Oench, Duhme*[4] and section 1823(e)[5] defenses in appeals from cases tried prior to insolvency. If a judgment adverse to a bank's interest in an asset is

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3. Under certain circumstances, post-insolvency interest can be added to claims so as to increase the amount due at the time the receiver was appointed. *Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 411 (1938); *First Empire Bank*, 572 F.2d at 1372.

4. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

5. 12 U.S.C.A. § 1823(e) (West 1989).

signed prior to insolvency, the FDIC cannot raise its special defenses on appeal. *See RTC v. McCrory*, 951 F.2d 68, 71 (5th Cir.), *cert. denied*, 113 S. Ct. 459 (1992); *Thurman v. FDIC*, 889 F.2d at 1447; *Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n*, 885 F.2d 266, 274-75 (5th Cir. 1989). The same rule should apply to policy arguments unique to the FDIC's status as receiver.

C. The decision below adversely impacts all parties to bank receiverships, including the FDIC.

The decision of the court of appeals is so contrary to the established law regarding bank receiverships that it should be reviewed and corrected by the Supreme Court. The impact of that decision is not limited to the numerous litigants like Taylor who have recovered punitive damage judgments against banks that were later declared insolvent. By holding that a judgment assumed by the FDIC as receiver is a judgment against the United States, the court of appeals has made the federal treasury responsible for the claims asserted by creditors of failed banks without regard to whether the FDIC has violated its statutory responsibilities as receiver. By altering the rule that the receiver's rights and obligations are fixed as of the time of appointment, the court of appeals has exposed the corpus of the receivership estate to depletion by post-insolvency events. By ruling that a final judgment adverse to a bank can be set aside simply because the bank has been declared insolvent, the court of appeals has altered the fundamental principle that appeals must be premised on trial court errors and not post-judgment occurrences. These departures from precedent impede the orderly disposition of bank receiverships.

CONCLUSION

Taylor was awarded a punitive damages judgment prior to the insolvency of MBank. Instead of focusing on the propriety of the verdict underlying that judgment, the FDIC argued that bank receivers need never pay punitive damage judgments regardless of when they were signed. That argument by the FDIC and the opinion below both ignore the well-settled rule that the receiver's obligations are fixed at the time of its appointment. The FDIC's status as an agency of the United States government does not raise the sovereign immunity defense because the judgment must be paid by the receivership estate and not by the sovereign. Taylor's award of punitive damages should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Petition for Writ of Certiorari have been forwarded by messenger to Mr. Joseph S. Cohen, Hirsch & Westheimer, P.C., 25th Floor, NationsBank Center, 700 Louisiana, Houston, Texas 77002 and by First Class mail, postage prepaid, to Mr. Gregory E. Gore, FDIC, Washington, D.C. 20429, on this _____ day of January, 1993.

_____

ROBERT HAYDEN BURNS

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90-2654

BANK ONE, TEXAS, N.A. and FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR MBANK HOUSTON, N.A.,

Plaintiffs-Third Party Defendants-Appellants,

versus

SUZAN E. TAYOR d/b/a EXPLORATION SERVICES,

Defendant-Third Party Plaintiff-Appellee,

versus

WORTH OPERATING, INC., ET AL.,

Third Party Defendants.

Appeal from the United States District Court for the Southern District of Texas

Before REYNALDO G. GARZA and GARWOOD, Circuit Judges, and MAHON, District Judge.*

MAHON, District Judge:

This appeal arises out of a lawsuit commenced by MBank Greens Parkway, N.A., predecessor of MBank Houston, N.A., (MBank) to recover on three unpaid promissory notes executed by Ms. Suzan Taylor d/b/a Exploration Services (Taylor). A jury trial resulted in a verdict of $9.6 million in favor of Taylor based upon her
assertion of various lender liability claims against MBank. For the reasons stated below, we conclude that the punitive damage award is unsustainable, but find there is sufficient evidence to support the remainder of the jury's verdict.

I. FACTS AND PROCEEDINGS BELOW

The dispute which brought about the present litigation arose in 1984. Taylor at the time was the sole owner of a company called Exploration Services, a business which provided geological and geophysical

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* District Judge of the Northern District of Texas, sitting by designation.

consulting services for oil and gas companies. In October 1984, Taylor entered into an agreement with C.I. Oil, Inc. (CI) in which she acquired an interest in a petroleum drilling prospect in Louisiana known as the Comite Prospect. In accordance with their agreement, Taylor deposited $300,000 into two money market checking accounts at MBank to pay CI for an interest in the prospect. The agreement provided that once CI turned over Taylor's interest in the prospect and furnished Taylor the well log showing the well had been drilled to the specified depth, Taylor would authorize MBank to release the $300,000 to CI. CI had no agreement with MBank nor was it a signatory on either account.

Though Taylor had originally instructed MBank to pay the deposited funds to CI, she changed those instructions when it appeared that CI could not or would not transfer all of the interest to her in accordance with their agreement. On November 20, 1984, Taylor wrote MBank instructing it to disburse $220,000 of these funds to CI and $80,000 to Sequoia Resources "in accordance with the . . . [a]greement by and between Exploration Services and C.I. Oil, Inc. and only upon written authorization of Suzan E. Taylor." The following day, CI and Sequoia agreed to this disbursement arrangement.

On December 17, 1984, CI produced the well log described in the agreement and made written demand upon MBank for the $220,000, informing the bank that CI would hold MBank liable for any disbursement of those funds in a "manner contrary to the distribution instructions of Taylor's letter of

November 20." Because Taylor and CI continued to dispute the amount of lease interest to be conveyed under their agreement, Taylor refused to provide MBank written authorization for the release of the $220,000 to CI. MBank therefore immediately froze the accounts and demanded that Taylor settle her dispute with CI. Despite Taylor's repeated requests for MBank to release her funds, MBank continued the freeze on Taylor's accounts for almost four months, insisting that CI and Taylor resolve their differences. During this period, Taylor lost the opportunity to participate in both the Comite Prospect and another prospect called Santa Paula.

When Taylor made another written demand for the funds on March 7, 1985, MBank filed a state court interpleader action against Taylor and CI. Taylor and CI eventually reached a settlement and gave consistent instructions to MBank as to the disposition of the account balances on April 12, 1985. MBank, however, refused to dismiss the state interpleader action or permit Taylor to have access to the funds until she signed a release absolving MBank from all liability. On April 16, 1985, MBank, Taylor and CI reached a final settlement of the interpleader action in which MBank agreed to absorb its attorney's fees in return for Taylor's agreement to release MBank from any liability. The interpleader action was later dismissed on May 8, 1985, on MBank's motion for nonsuit. The next day Taylor received a letter from MBank demanding that all four of her outstanding

loans be paid in full within five days[1] even though the two secured loans were not past due. Six days later, MBank repossessed Taylor's Jaguar automobile and commenced admiralty proceedings in federal court to repossess Taylor's yacht which was later seized and sold at public auction.

MBank then initiated the present litigation in state court to recover the indebtedness on the two unsecured loans and recover the deficiency on the note secured by the Jaguar automobile. Taylor filed a counterclaim against MBank contending that the release executed by Taylor in settlement of MBank's interpleader action was procured by fraud and economic duress and was invalid for want of consideration. In addition, Taylor claimed that because MBank had tortiously frozen her accounts, she lost the opportunity to participate in the Comite and Santa Paula prospects causing her to suffer damages in excess of $28 million. Taylor also asserted that MBank wrongfully accelerated the car and yacht loans and had conspired with her former business partner, Worth Energy Corporation, to her detriment.

The trial of this case lasted seven weeks and produced over 5,000 pages of transcript and several volumes of exhibits. At the conclusion, the jury found MBank liable for engaging in false, misleading and

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1 Taylor had executed the following promissory notes in favor of MBank: (1) an unsecured loan in the face amount of $90,000; (2) an unsecured loan in the face amount of $50,000; (3) a loan in the face amount of $29,062.81, secured by a 1984 Jaguar automobile; and (4) a loan in the face amount of $106,651.96, secured by a Sea Ray yacht.

deceptive practices in violation of the Texas Deceptive Trade Practices--Consumer Protection Act (DTPA), Tex. Bus. & Com. Code Ann. §§ 17.41-17.826 (Vernon 1987). The jury also found MBank had tortiously interfered with Taylor's business dealings, conspired to harm Taylor's business, and failed to act in good faith in connection with the "Comite" accounts as well as the car and yacht loans. The jury found that, while there was no evidence of fraud in the execution of the settlement agreement, MBank did coerce Taylor through economic duress to sign the release and failed to give valid consideration for the release agreement.

Based upon the jury's answers to the special issues, the district judge entered final judgment against MBank. In the judgment, the court deducted from the jury award the past due principal and accrued interest on two unsecured notes Taylor concededly owed. In addition, the court entered a take-nothing judgment on MBank's claim for the deficiency on the third note secured by Taylor's Jaguar and denied MBank's claim for attorney's fees and expenses in connection with the two unsecured loans. The trial court later denied MBank's motion for judgment notwithstanding the verdict, and final judgment was entered in the amount of $9,639,841.65.[2]

MBank thereafter filed post-judgment motions for new trial and to modify, correct, or reform the

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2. Worth Energy Corporation, Taylor's former business partner and its principal officers Aaron W. Hees and Jim W. Howard were held jointly and severally liable with MBank for approximately $2.4 million of the damages, but did not join in this appeal.

judgment. Before the state trial court could rule on MBank's motions, MBank was declared insolvent, and the Federal Deposit Insurance Corporation (FDIC) was appointed its receiver. The FDIC, as receiver of MBank, filed a plea in intervention in the state court action and adopted MBank's then current pleadings, including its motion for new trial and motion to modify, correct, or reform the judgment. Following its intervention, the FDIC removed the action to federal district court. The FDIC and Bank One, Texas, N.A., (Bank One), successor-in-interest to MBank, then filed memorandum briefs in support of MBank's previously filed motions for new trial and to alter or amend the judgment. The district court denied the motions, and the FDIC and Bank One appealed the judgment to this court. In this appeal, FDIC, as receiver of MBank, is the proper party to defend against Taylor's counterclaims, while Bank One, successor-in-interest to MBank, is the party entitled to pursue collection on the notes on which MBank originally brought suit.

II. STANDARD OF REVIEW

In the present appeal, the FDIC broadly contends there was insufficient evidence presented at trial to support the jury's findings that Taylor executed the settlement agreement under duress, that the settlement agreement lacked valid consideration, and that MBank committed deceptive practices in freezing Taylor's accounts. We consider the various insufficiency points cited by appellants as an appeal from the trial court's denial of MBank's motion for judgment notwithstanding the verdict and apply the same standards as that of the district court. *Melear v. Spears*, 862 F.2d 1177, 1182 (5th Cir. 1989); *Granberry*

v. O'Barr, 866 F.2d 112, 113 (5th Cir. 1988).[3] We are guided in this task by the overriding "principle that 'it is the function of the jury as the traditional finder of fact, and not the Court, to weigh conflicting evidence . . . .'" *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 164 (5th Cir. 1990) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc)). "Weighing conflicting evidence and the inferences to be drawn from that evidence, and determining the relative credibility of the witnesses, are the province of the jury, and its decision must be accepted if the record contains any competent and substantial evidence tending fairly to support the verdict." *Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275, 1297 (5th Cir. 1988) (citing *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985), *cert. denied*, 490 U.S. 1091 (1989)). We have defined substantial evidence as "'evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions.'" *Transoil (Jersey) Ltd. v. Belcher Oil Co.*, 950 F.2d 1115, 1118 (5th Cir. 1992) (citing *Boeing*, 411 F.2d at 374-75). In reviewing a denial of a motion for judgment notwithstanding the verdict, the appellate court is bound to consider all of the evidence and all reasonable inferences in the light most favorable to the prevailing party. *Rideau v.*

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3. This action was removed post-judgment from the state court to the federal district court. Accordingly, the scope of our review in this appeal is governed by federal, rather than state law, standards. *Pagan v. Shoney's Inc.*, 931 F.2d 334, 337 (5th Cir. 1991); *Garner v. Santoro*, 865 F.2d 629, 642 (5th Cir. 1989); *see also Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 437 (1974).

Parkem Indus. Servs., Inc., 917 F.2d 892 (5th Cir. 1990), and the jury verdict must be upheld unless "the facts and inferences point so strongly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict." *Boeing*, 411 F.2d at 374. Having set out the applicable standard of review, we now turn to the appellants' contentions raised in this appeal.

III. THE RELEASE

At the outset, the FDIC maintains the jury erred in setting aside the release because there is overwhelming evidence that the release agreement was supported by valuable consideration. We disagree. Having carefully reviewed the record before us, we hold there was substantial evidence to support the jury's determination that the release was void for lack of consideration.

In Texas, a release is treated as a type of contract, *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 92 (Tex. 1973), and like any other contract, must be supported by valuable consideration. *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d 893, 903 (Tex. App.--Corpus Christi 1989), *modified*, 811 S.W.2d 931 (Tex. 1991); *Tobbon v. State Farm Mut. Auto. Ins. Co.*, 616 S.W.2d 243, 245 (Tex. Civ. App.--San Antonio 1981, writ ref'd n.r.e.). Consideration for a release "can consist of [either] a benefit to the promisor or a loss or detriment to the promisee." *Garcia v. Villarreal*, 478 S.W.2d 830, 832 (Tex. Civ. App.--Corpus Christi 1971, no writ); *see also Buddy L, Inc. v. General Trailer Co.*, 672 S.W.2d 541, 547 (Tex. App.--Dallas 1984, writ ref'd n.r.e.). If it is determined that a release was executed without

valuable consideration, it may be invalidated. *Victoria Bank*, 779 S.W.2d at 903; *McClellan v. Boehmer*, 700 S.W.2d 687, 693 (Tex. App.--Corpus Christi 1985, no writ).

As stated previously, Taylor signed a release in 1985 in which she agreed to absolve MBank from any and all claims or causes of action she might have for its handling of the subject accounts. In return, MBank agreed to forego its right to seek its attorney's fees in the interpleader action. The question whether the release was supported by consideration was submitted as a jury issue, and the jury specifically found that MBank failed to give valid consideration for the release. The FDIC argues on appeal that this factual finding was not supported by substantial evidence because MBank's agreement to absorb its attorney's fees provided ample consideration for the release. Taylor, on the other hand, contends that the release was completely lacking in valid consideration and must be set aside because MBank filed an improper interpleader and therefore forfeited any right to recover its attorney's fees.

Under Texas law, MBank was entitled to an award of attorney's fees in the interpleader action only if MBank proved it was "a disinterested stakeholder who ha[d] reasonable doubts as to the party entitled to the funds or property in [its] possession, and who in good faith . . ." filed an interpleader action against the claimants. *United States v. Ray Thomas Gravel Co.*, 380 S.W.2d 576, 580 (Tex. 1964); *Foreman v. Graham*, 693 S.W.2d 774, 778 (Tex. App.--Fort Worth 1985, writ ref'd n.r.e.). In

order to bring an interpleader under Rule 43,[4] a stakeholder is not required to be wholly disinterested in the suit. Rather, it "need only show that it is or may be exposed to double or multiple liability as a result of conflicting claims justifying a reasonable doubt as to which claimant is entitled to the funds." *Sears Sav. & Profit Sharing Fund v. Stubbs*, 734 S.W.2d 76, 79 (Tex. App.--Austin 1987, no writ) (citing *Davis v. East Texas Sav. & Loan Assoc.*, 163 Tex. 361, 354 S.W.2d 926 (1962)); *Downing v. Laws*, 419 S.W.2d 217 (Tex. Civ. App.--Austin 1967, writ ref'd n.r.e.). While the stakeholder's interest in the suit is irrelevant for purposes of commencing an action under Rule 43, in order to be entitled to an award for attorney's fees, a stakeholder must be disinterested as to the outcome of the controversy. *See Ray Thomas Gravel Co.*, 380 S.W.2d at 580; *Foreman*, 693 S.W.2d at 778; *Brown v. Getty Reserve*

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4. Rule 43 of the Texas Rules of Civil Procedure governs the procedure for initiating an interpleader action in state court. Rule 43 provides as follows:

> Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in any other rules.

Oil, Inc., 626 S.W.2d 810, 815 (Tex. App.--Amarillo 1981, writ dism'd).

Texas courts have articulated a number of specific requirements for properly instituting an interpleader action. A petitioner must plead and prove that: (1) he is either subject to, or has reasonable grounds to anticipate, rival claims to the same fund or property;[5] (2) he has filed the interpleader without unreasonable delay;[6] and (3) he has made an unconditional tender of the fund into the court.[7] If a *disinterested* stakeholder fails to meet any one of these three prerequisites for filing an interpleader, he is not entitled to an award of attorney's fees. The FDIC insists that MBank met all three requirements and therefore was justified in filing the interpleader. In deciding this issue, we first review the deposit agreement between Taylor and

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5. *Great American Reserve Ins. Co. v. Sanders*, 525 S.W.2d 956, 958 (Tex. 1975); *Ray Thomas Gravel Co.*, 380 S.W.2d at 580; *Davis*, 354 S.W.2d at 930; *Sears Sav. & Profit Sharing Fund*, 734 S.W.2d at 79.

6. *Sears Sav. & Profit Sharing Fund*, 734 S.W.2d at 79; *National Life & Accident Ins. Co. v. Thompson*, 153 S.W.2d 322, 323 (Tex. Civ. App.--Waco 1941, writ ref'd); *see also Great American Reserve Ins. Co. v. Sanders*, 525 S.W.2d at 959; *see generally* 1 Roy W. McDonald & Frank W. Elliott, *Texas Civil Practice in District and County Courts* §§ 3.40, 3.42 (4TH ED. 1991); *47 Tex. Jur. 3rd Interpleader* § 5 (1986).

7. *Sears Sav. & Profit Sharing Fund*, 734 S.W.2d at 79; *Cockrum v. Cal-Zona Corp.*, 373 S.W.2d 572, 574-75 (Tex. Civ. App.--Dallas 1963, no writ); *Bennett v. Smead*, 180 S.W.2d 663, 663-64 (Tex. Civ. App.--Texarkana 1944, no writ); *see generally* McDonald & Elliott *supra* note 6, § 3.42.

MBank to determine whether MBank had reasonable doubts as to which party was entitled to the funds.

In November 1984, MBank opened two commercial checking accounts for Taylor. The standard deposit agreement, which Taylor signed when MBank opened the accounts, provided in pertinent part:

> The Deposit with MBank Greens Parkway, National Association, Houston, Texas ("Bank") of any check, draft, or other instrument ("Item") or cash shall constitute a contract ("Contract"), between Bank and the person, firm, association or corporation ("Depositor", whether one or more) to whom credit for such item and/or cash is given by this Bank. The terms of such Contract are as follows:
>
> 1. Other than as provided by the terms of this Contract, *the Bank acts only as agent for Depositor*. (emphasis added).

In a separate deposit agreement executed in connection with the opening of the two accounts, it was agreed that:

> All funds at any time on deposit in the aforementioned account shall be subject to withdrawal by . . . Suzan E. Taylor . . . Bank is authorized to honor any and all such withdrawals whether or not they are payable to the order of the person signing, or countersigning, the same, or payable to Bank or Bank's order, and whether or not such withdrawals are presented for cash or for credit

> to the personal account of the person presenting the same, and Bank need make no inquiries concerning any such withdrawal.

The terms and conditions of the deposit agreements do not refer to a third party agreement, nor do they furnish the bank with any special instructions on how the funds should be applied. Nowhere is it mentioned that Taylor is restricted from withdrawing any or all of the account funds on deposit at any time. In addition, CI was not a signatory on the account and had no control over the account funds on deposit. Though Taylor maintained the accounts in the names "'Comite' Escrow Account III" and "'Comite' Escrow Account IV," the law is clear that a mere deposit of earnest money into a bank account is not sufficient to create an escrow contract or create escrow liabilities. *Cowman v. Allen Monuments, Inc.*, 500 S.W.2d 223, 225-26 (Tex. Civ. App.--Texarkana 1973, no writ.); *cf. La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 564 (Tex. 1984) (deposit creates implied agreement that bank will disburse funds only at the direction of depositor). Faced with its own deposit agreements, MBank could not reasonably have concluded that these accounts were anything other than commercial checking accounts in which CI had no valid claim or interest.

The FDIC argues that MBank could have reasonable doubts because the agreement executed by Taylor and CI prohibited the bank from releasing the funds contrary to the terms of their agreement. This agreement, however, was a contract only between CI and Taylor. MBank was neither a party to the contract, nor does the evidence show that MBank expressly or impliedly consented to act as the escrow

agent for the parties. Furthermore, there is nothing in the record to suggest that MBank and CI ever entered into any agreement regarding the disposition of the account funds. Absent such an agreement, it is elemental contract law that MBank owed no contractual duty to CI and therefore was not required to recognize CI's putative claim.[8]

The fundamental basis of the relationship between a bank and its customer is the bank's agreement to pay out the customer's money in accordance with his order. In view of the unequivocal terms of the deposit agreement, the jury could reasonably have concluded that MBank did not harbor reasonable doubts as to which party was entitled to the funds and thus did not meet the first requirement for instituting a proper interpleader.

Even if MBank had reasonable doubts, it wholly failed to meet either of the remaining requirements for initiating a proper action in interpleader. MBank was required to file the interpleader action without unreasonable delay. The record in this action indicates that MBank first received a written demand for the funds on December 18, 1984. In the demand letter, CI made clear that it would hold MBank liable

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8. Further, under Texas law a bank is not required to recognize the claim of a third party to any deposit unless it is served with process in a lawsuit filed by such third party. *See* Tex. Rev. Civ. Stat. Ann. art. 342-704 (Vernon Supp. 1991). Here, CI merely threatened suit and never instituted a civil action against MBank. Therefore, even if CI had a valid claim against the account, MBank was not required to recognize such a third party claim until suit was filed.

for any disbursement of those funds in a manner inconsistent with the parties' agreement. Despite CI's threatened legal action, MBank failed to take any action until March 7, 1985, when Taylor threatened to sue MBank for wrongful withholding of funds. In the meantime, MBank kept the funds on deposit and delayed the filing of the interpleader for almost 12 weeks in the belief that it could offset the account to reduce Taylor's debt. Instead of acting as a "disinterested stakeholder," MBank, for its own financial interests, continued to hold the funds in Taylor's frozen account for almost three months before commencing the interpleader action. We believe the jury was entitled to conclude that even if MBank had reasonable doubts as to which party was entitled to the funds, it failed to promptly initiate an action in interpleader and, in so doing, failed to "exercise[ ] that degree of diligence and impartiality which the law requires in order to secure for itself the benefits conferred upon a mere stakeholder under a proper bill of interpleader." *National Life & Accident Ins. Co. v. Thompson*, 153 S.W.2d at 323-24; *see also Sears Sav. & Profit Sharing Fund*, 743 S.W.2d at 79.

To fulfill the final requirement for filing a proper interpleader action, the stakeholder also must tender the funds into the court. Under Texas procedure, "[i]f the . . . fund is not actually paid into the registry of the court, it must be tendered and the tender, in order to be valid, must be unconditional." *Cockrum v. Cal-Zona Corp.*, 373 S.W.2d at 574; *Bennett v. Smead*, 180 S.W.2d at 664; *see also Security Nat'l Bank of Lubbock v. Washington Loan & Finance Corp.*, 570 S.W.2d 40, 43 n.4 (Tex. Civ. App.--Dallas 1978, writ dism'd). Here, the account funds were neither paid into the registry of the court nor

unconditionally tendered. Instead, MBank kept the funds on deposit and sought to exercise a purported right of offset. Even after consistent instructions were given by Taylor and CI as to the distribution of the funds, MBank refused to make an unconditional tender, asserting an additional claim for its attorney's fees.

Thus, even under the most generous reading of the record, there is little, if any, evidence that shows MBank met even one of the three essential requirements for filing a proper interpleader action, let alone that it acted as an innocent disinterested stakeholder in the interpleader action. Moreover, by wrongfully withholding the funds until Taylor signed a complete release of all claims against it, MBank also failed to exercise good faith in the settlement of the interpleader. *See Bentley v. Grewing*, 613 S.W.2d 49, 52 (Tex. Civ. App.--Fort Worth 1981, writ ref'd n.r.e.). For the reasons stated, we find no grounds upon which MBank could assert a valid claim for attorney's fees.

The FDIC maintains that MBank's forbearance of its claim for attorney's fees in the interpleader action is sufficient consideration to support the release agreement.[9] In support of this argument, the FDIC

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9. In its reply brief, the FDIC raises for the first time the argument that Taylor benefitted from the release because MBank waived its right to offset the accounts and Taylor obtained an increased share of the Comite prospect from CI. Absent manifest injustice, "this court will not consider arguments belatedly raised after appellees have

(footnote continued on next page)

relies upon a long-standing rule of contracts which states that forbearance to enforce a claim or right is ample consideration to support a contract even though it ultimately appears the claim is without merit. *See Kennard v. McCray*, 648 S.W.2d 743, 745-46 (Tex. App.--Tyler 1983, writ ref'd n.r.e.); *Iden v. Ackerman*, 280 S.W.2d 643, 646-47, (Tex. Civ. App.--Eastland 1955, writ ref'd); *Russell v. Lemons*, 205 S.W.2d 629, 632 (Tex. Civ. App.--Amarillo 1947, writ ref'd n.r.e); *Cleburne State Bank v. Ezell*, 78 S.W.2d 297, 299 (Tex. Civ. App.--Waco 1934, writ dism'd) (citing *Hunter v. Lanius*, 82 Tex. 677, 18 S.W. 201 (1892)). The FDIC, however, fails to recognize an important exception to this principle. Forbearance is not sufficient consideration unless the party asserts the claim in good faith and has reasonable grounds in believing that he had such a right. *Stewart v. Friona State Bank*, 278 S.W.2d 425, 433 (Tex. Civ. App.--Amarillo 1955, writ ref'd n.r.e); *Cleburne State Bank*, 78 S.W.2d at 299; *Wells v. Timms*, 275 S.W. 468, 471 (Tex. Civ. App.--Fort Worth 1925, writ dism'd) (citing *Von Bradenstein v. Ebensberger*, 71 Tex. 267, 9 S.W. 153 (1888); *see* 14 Tex. Jur. 3rd *Contracts* § 120 (1981); Restatement (Second) of Contracts § 74(1) (1979). *See generally* 3 Samuel Williston and Richard A. Lord *A Treatise on the Law of Contracts*

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filed their brief." *Najarro v. First Federal Savings and Loan Ass'n of Nacogdoches, Texas*, 918 F.2d 513, 516 (5th Cir. 1990). We find no manifest injustice by declining to address appellants' arguments on these points.

§ 7:45 (4th ed. 1992); 1 Arthur L. Corbin, *Corbin on Contracts* § 140 (1963).[10]

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10. Texas intermediate appellate court opinions have employed a wide variety of language, some of it inconsistent and much of it dicta, to describe the correct standard in this respect. For example, in *Cleburne State Bank v. Ezell*, 78 S.W.2d 297, 299 (Tex. Civ. App.--Waco 1934, writ dism'd), the opinion initially states that the forbearance is sufficient consideration "provided he in good faith and upon reasonable grounds believed that he had such a right," but then, in upholding the jury verdict in favor of the settlement, speaks only of good faith: "Whether or not there was an honest assertion of a right to recover against Ezell and whether or not the officials of the bank in good faith believed that Ezell was liable to the bank on the claim asserted were questions of fact to be determined by the jury." In both *Wells v. Timms*, 275 S.W. 468, 471 (Tex. Civ. App.--Fort Worth 1925, writ dism'd), which sustained the settlement, and *Stewart v. Friona State Bank*, 278 S.W.2d 425, 432-33 (Tex. Civ. App.--Amarillo 1955, writ ref'd n.r.e.), which did not, there is language indicating that both reasonable grounds and good faith are required, but in neither case does the conjunctive appear to have been material to the decision. Thus, in *Stewart* the majority notes that "[t]here is no evidence in this record of a bona fide dispute of any nature." *Id.* at 432. In *Wells* the court relied in part on a passage from a text stating, with apparent inconsistency, that "'. . . it is not necessary in a suit on a promise given in consideration of a forbearance from suit that it should appear that there was . . . a fair and reasonable ground of success in the threatened suit. . . . It is only essential that the claim be doubtful either in law or equity and asserted in good faith.'" *Id.* at 471 (quoting Vol. 1 *Elliott on Contracts* at 407).

In *Iden v. Ackerman*, 280 S.W.2d 643, 646 (Tex. Civ. App.--Eastland 1955, writ ref'd), the court quotes with approval the following language from 15 C.J.S.

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Compromise and Settlement § 11 p. 732, *viz.*:

> To support a compromise it is not essential that the question in controversy be in fact doubtful in legal contemplation. It is sufficient that there be an actual controversy between the parties of which the issue fairly may be considered by both parties as doubtful and that, at the time of the compromise they in good faith so consider it.

See also Goodwin v. Texas Employers' Ins. Ass'n, 73 S.W.2d 660, 663 (Tex. Civ. App.--El Paso 1934, writ dism'd) ("The fact that it subsequently developed that the nature, character and extent of plaintiff's injury and the liability of the defendant was not in fact doubtful does not invalidate the settlement nor present any ground for setting the contract aside."); 12 Tex. Jur. 3rd Compromise and Settlement, § 6 at 269-270. In *Murtagh v. University Computing Company*, 490 F.2d 810, 815 (5th Cir. 1974), we stated, applying Texas law, that "[t]he existence of an antecedent bona fide dispute between the parties concerning the subject matter of a subsequent settlement agreement is sufficient legal consideration for creation of an enforceable agreement." The Texas Supreme Court last spoke authoritatively to this issue in *Hunter v. Lanius*, 82 Tex. 677, 18 S.W. 201 (1892). In that case, the court held that ". . . a note is supported by a sufficient consideration, if executed to secure the abandonment of a suit brought to enforce a doubtful right, or in compromise of a disputed claim made in good faith, though it ultimately appears that the claim is without merit." *Id.* at 205. Although the Texas courts have enunciated divergent opinions on this issue, we need not decide the controlling standard because there is sufficient evidence to support the findings that the bank had *neither* reasonable grounds to believe its claim was proper *nor* good faith in pursuing it, and all authorities agree that in such a situation there is no consideration.

Whether MBank honestly believed it had a right to its attorney's fees and whether the officials at the bank believed in good faith that Taylor was liable to the bank on its claim were questions of fact to be determined by the jury. *Cleburne State Bank*, 78 S.W.2d at 299. The record contains considerable evidence bearing on this issue. First, the evidence clearly shows that MBank was not subject to, nor had reasonable grounds to anticipate, rival claims to the account fund. Under the unambiguous terms of the deposit agreements, MBank owed a contractual duty only to its depositor, Suzan Taylor, not to CI. Second, MBank unreasonably delayed filing the interpleader action in order to secure its own interest in the account proceeds. Third, MBank failed to make an unconditional tender of the funds into the registry of the court and held the funds on deposit so it could exercise an assumed right of offset. Finally, MBank failed to make a good faith settlement of the interpleader after it received consistent instructions from the claimants. In light of the foregoing, it is hard to imagine how MBank could have had a reasonable belief in the validity of its claim for attorney's fees. Indeed, MBank's own lawyers testified that they advised the bank of their concern the court would be "hard-pressed" to allow the interpleader action to continue once consistent instructions were received from Taylor and CI.

As demonstrated above, substantial evidence indicates that when the release was executed MBank's claim for attorney's fees was *neither* doubtful *nor* asserted in good faith. Bearing in mind that all reasonable inferences from the evidence must be resolved in favor of the jury's verdict, we are satisfied there is substantial evidence from which the jury

could conclude that MBank knew or should have known that it was not entitled to an award of attorney's fees from the interpleader action and did not assert such a claim in good faith. We therefore accept the jury's conclusion that the release was void for lack of consideration.[11]

IV. THE ACCOUNT FREEZE

The FDIC contends that even if the release was not enforceable, the "judgment . . . should be reversed because the escrow account freeze was legally justified." (Appellants' Br. at 34). In its argument, the FDIC broadly asserts that the freezing of the account was fully justified under the circumstances because the funds were deposited in an "escrow account" and were only to be disbursed in accordance with the agreement between Taylor and CI. The FDIC, however, raises this point of error without challenging any specific factual finding in the jury's verdict or indicating which of the various issues submitted was

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11. Because a release agreement may be declared invalid on any one of several grounds, we need not reach the issue of whether the release was executed under duress. *Victoria Bank & Trust Co. v. Brady*, 779 S.W.2d at 903.

We also observe that appellants have not asserted on appeal (and apparently the bank did not assert at trial) that the dismissal judgment in the interpleader suit had a *res judicata* or collateral estoppel effect. *See, e.g., Rhoades v. Prudential Leasing Corporation*, 413 S.W.2d 404, 407 (Tex. Civ. App.--Austin, 1967, no writ history) (". . . a judgment of dismissal entered by agreement of the parties in pursuance of a compromise, or settlement of a controversy, becomes a judgment on the merits"). Thus, we have no occasion to, and do not, pass on the effect of the judgment of dismissal in the interpleader suit.

not supported by the evidence. It is established law that matters which have not been adequately briefed are precluded from consideration on appeal. *In re HECI Exploration Co., Inc.*, 862 F.2d 513, 525 (5th Cir. 1988); *Morrison v. City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985). The FDIC's failure to specify precisely which jury finding was in error, would, in effect, require this court to consider whether the verdict taken as a whole was supported by substantial evidence. Because such a review would be limitless, we consider the FDIC's arguments on these issues waived and decline to address them. *See Franceski v. Plaquemines Parish School Bd.*, 772 F.2d 197, 199 n.1 (5th Cir. 1985); *In re Texas Mortgage Services Corp.*, 761 F.2d 1068, 1073-74 (5th Cir. 1985); *Kemlon Products & Development Co. v. United States*, 646 F.2d 223, 224 (5th Cir.), *cert. denied*, 454 U.S. 863 (1981).

Even if we were to assume that the FDIC's argument was sufficiently briefed, the evidence is quite clear that MBank had no right to freeze Taylor's accounts. Taylor opened two commercial checking accounts with MBank. Under the terms and conditions of the deposit agreements, MBank and Taylor agreed that the bank would be the agent for Taylor only and would "honor any and all withdrawals" from the accounts by the authorized signatory, Suzan Taylor. Thus, MBank was bound to obey the orders of Taylor under the express terms of their contract. Moreover, under Texas law, Taylor's deposit of funds with Mbank created an implied agreement that the bank would disburse those funds only in accordance with Taylor's instructions. *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 564 (Tex. 1984), *citing Mesquite State*

Bank v. Professional Invest. Co., 488 S.W.2d 73, 75 (Tex. 1972). Considering the entire record of this case, particularly the initial deposit agreements which created both accounts, we are of the opinion that no "escrow account" existed and that MBank, in freezing Taylor's accounts, failed to comply with the express terms of the deposit contracts in wanton disregard of Taylor's rights.

In its next point of appeal, the FDIC argues there is insufficient evidence to support the jury's finding that the account freeze was a "producing cause" of Taylor's damages under the DTPA.[12] Section 17.50 of the DTPA authorizes consumers to hold sellers liable for actual damages where "a false, misleading, or deceptive act or practice" is "a producing cause" of those damages.[13] In *Pope v. Rollins Protective Services Co.*, this court noted that:

> One of the primary reasons for the enactment of the DTPA was to provide consumers with a remedy for deceptive trade practices without the burdens of proof and numerous defenses

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12. In Texas, when a depositor pays service fees and the bank in return agrees to honor the checks of its depositor, the depositor is a "consumer" of banking "services" within the purview of the DTPA. *Farmers & Merchants State Bank of Krum v. Ferguson*, 605 S.W.2d 320, 324 (Tex. Civ. App.--Fort Worth 1980), *modified*, 617 S.W.2d 918 (Tex. 1981). The FDIC does not dispute the applicability of the DTPA to this transaction.

13. Tex. Bus. & Com. Code Ann. § 17.50(a) (1).

> encountered in a common law fraud or breach of warranty action.[14]

Emphasizing the broad remedial purposes of the DTPA, Section 17.44 provides:

> This subchapter shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.

There is no dispute that Taylor was required to prove that MBank's action in freezing the accounts was a producing cause of her damages. The jury was instructed that "'producing cause' means an efficient, exciting or contributing cause, which, in a natural and continuous sequence produced the damage or harm complained of, if any." While the FDIC does not challenge this jury instruction, it does contend there is insufficient evidence to support the jury's finding that MBank's actions were a producing cause of Taylor's damages. According to the FDIC, the account freeze did not cause Taylor to lose the opportunity to participate in the Comite and Santa Paula prospects since (1) payment for both prospects did not come due until after the freeze was lifted, and (2) Taylor had substantial assets which could reasonably have

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14 . 703 F.2d 197 (5th Cir. 1983); *see also Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980).

been used to pay for or obtain financing for the prospects during the freeze.

Shortly before drilling activities began on the Comite prospect, MBank froze Taylor's accounts. The accounts remained frozen from December 18, 1984 until April 16, 1985. According to the drilling contract, payment was due as soon as the well was drilled to a certain depth, not on the completion of a successful producing well. Thus, when it became apparent that Taylor could not resolve her dispute with MBank and obtain the needed funds in time to pay for the drilling, Taylor suspended drilling operations. The FDIC argues that even if Taylor was required to cease drilling operations, she could have obtained extensions or paid delay rentals to keep the Comite lease alive. This argument, however, ignores the undisputed fact that Taylor never intended to assume more than a 25% working interest in the Comite venture and that by the time MBank released the funds, the opportunity to develop this prospect with the same working interest did not exist. Even if Taylor had wanted to continue to develop the prospect after the bank released her money, she would have been required to take a full 100% working interest in the prospect--a share that would have cost far more than the amount of funds she had on deposit at MBank.

Taylor also lost the opportunity to participate in the Santa Paula Prospect because of MBank's wrongful actions. Though Taylor briefly acquired the Santa Paula lease by assignment in February of 1985, she essentially lost the opportunity to invest in the prospect when MBank repeatedly refused payment on a $100,000 check intended to pay for her share of the

lease. By the time MBank released the funds in April 1985, Taylor no longer had a co-investor to develop the Santa Paula property and therefore could not participate in the prospect with the same working interest. Based upon the evidence adduced at trial, the jury could reasonably have concluded that the account freeze was a producing cause of Taylor's loss in the Comite and Santa Paula Prospects.

The FDIC also maintains that the loss of the prospects could easily have been avoided had Taylor used her own assets, including her personal jewelry, geophysical data and cash, to either pay for or finance the drilling prospects during the freeze. This argument raises a damage question involving the doctrine of avoidable consequences. The doctrine of avoidable consequences is a fundamental rule of damages which requires the injured party to take advantage of reasonable opportunities to minimize his damages and avoid or prevent loss. *Gladden v. Roach*, 864 F.2d 1196, 1200 (5th Cir.), *cert. denied*, 491 U.S. 907 (1989); *Ford Motor Co. v. Dallas Power & Light Co.*, 499 F.2d 400, 414-15 (5th Cir. 1974); *City of San Antonio v. Guidry*, 801 S.W.2d 142, 151 (Tex. App.--San Antonio 1990, no writ). Texas courts have applied this rule for losses arising in actions in tort and breach of contract, as well as DTPA. *Pinson v. Red Arrow Freight Lines, Inc.*, 801 S.W.2d 14, 15 (Tex. App.--Austin 1990, no writ); *Pulaski Bank & Trust Co. v. Texas American Bank*, 759 S.W.2d 723, 735 (Tex. App.--Dallas 1988, writ denied); *see also Ford Motor Co.*, 499 F.2d at 415 n.27. Under the doctrine of avoidable consequences, an injured party with an otherwise valid cause of action who fails to mitigate his damages may not recover those damages shown to have resulted from his failure to use

reasonable efforts to avoid or prevent the loss. *Ford Motor Co.*, 499 F.2d at 415; *see Pinson*, 801 S.W.2d at 15; *Alexander & Alexander of Texas, Inc. v. Bacchus Industries, Inc.*, 754 S.W.2d 252, 253 (Tex. App.--El Paso 1988, writ denied).

Although an injured party is required to use reasonable diligence to minimize his losses, he is not required to "make unreasonable personal outlays of money," *Halliburton Oil Well Cementing Co. v. Millican*, 171 F.2d 426, 430 (5th Cir. 1948), or to "sacrifice a substantial right of his own." *Fidelity & Deposit Co. of Maryland v. Stool*, 607 S.W.2d 17, 25 (Tex. Civ. App.--Tyler 1980, no writ). Rather, an injured party is required to incur "only slight expense and reasonable effort" in mitigating his damages. *City of San Antonio*, 801 S.W.2d at 151 (quoting *Pulaski Bank & Trust Co.*, 759 S.W.2d at 735). One who claims a failure to mitigate damages has the burden to prove not only lack of diligence on the part of injured party, but also the amount by which damages were increased by such failure to mitigate. *Lakeway Land Co. v. Kizer*, 796 S.W.2d 820, 824 (Tex. App.--Austin 1990, writ denied); *Geotech Energy Corp. v. Gulf States Telecommunications & Info. Sys., Inc.*, 788 S.W.2d 386, 390 (Tex. App.--Houston [14th Dist.] 1990, no writ); *Cocke v. White*, 697 S.W.2d 739, 744 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.).

We conclude that MBank's proof failed to meet these requirements. The FDIC asserts that Taylor had substantial sums readily available to maintain these prospects. The undisputed testimony at trial, however, makes clear that a substantial portion of Taylor's money was already committed to pay for her company's payroll of some fifty employees, office

space and general business expenses. In addition, during the period of time the Comite drilling operation was shut down because of the account freeze, Taylor was required to pay sizable day rates to the drilling contractor while the rig was on standby. As for the FDIC's contention that Taylor could sell her jewelry or cars to fund the drilling prospects, we find this completely without merit. In taking reasonable efforts to minimize her losses, Taylor was not obligated to sell or encumber her own personal property in order to maintain these drilling prospects during the freeze. *Halliburton*, 171 F.2d 426, 430; *Pulaski Bank & Trust Co.*, 759 S.W.2d at 735; *Fidelity & Deposit Co.*, 607 S.W.2d 17, 25. Because MBank offered no evidence that Taylor failed to make reasonable efforts to minimize her losses and because MBank failed to prove the amount by which damages were increased, the trial court properly refused to instruct the jury on this issue.

The FDIC also challenges the jury instructions because the state trial court refused to submit to the jury MBank's defensive issues relating to the release, including ratification, waiver, estoppel, and accord and satisfaction. A trial court has broad discretion in composing a charge for the jury so long as the instructions are fundamentally accurate and not misleading. *Landrum v. Goddard*, 921 F.2d 61, 62 (5th Cir. 1991) (citing *Gates v. Northwest Ins. Co.*, 881 F.2d 215 (5th Cir. 1989)), *cert. denied*, 494 U.S. 1017 (1990). "The instructions need not be perfect in every respect provided that the charge in general correctly instructs the jury, and any injury resulting from the erroneous instruction is harmless." *Rogers v. Eagle Offshore Drilling Servs., Inc.*, 764 F.2d 300, 303 (5th Cir. 1985). In the present appeal, the FDIC has not

cited, nor do we find, evidence in the record to justify the requested instructions. Even if we were to assume MBank presented sufficient evidence to warrant the requested instructions, we conclude that the jury instructions taken as a whole correctly instructed the jury on controlling law and were fundamentally accurate and not misleading. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330, 1335 (5th Cir. 1991); *Landrum*, 921 F.2d at 62.

V. THE "DEMAND" PROVISIONS

MBank was also found liable for its failure to act in good faith when it accelerated the Jaguar and yacht loans. It is undisputed that immediately after the interpleader action was settled, MBank demanded full payment on all four of Taylor's outstanding loans even though she was current on both the Jaguar and yacht notes. At trial, MBank offered no evidence that Taylor was in default of any provision of these two loan agreements or that her payments on the secured loans were delinquent or past due. Instead, MBank argued unsuccessfully that because these promissory notes were demand notes, that it could demand payment at any time with or without reason.

The FDIC, on appeal, raises a similar contention and urges us to reverse the damage award on the basis the trial court erroneously submitted an instruction on "good faith."[15] In support of this argument, the FDIC

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15. This instruction provided as follows:
Special Issue No. 7
Do you find from a preponderance of the evidence

(footnote continued on next page)

relies upon the good faith provisions of the Tex. Bus. & Com. Code Ann. § 1.208 (Vernon 1968), as interpreted by the Official Comment to that section. Section 1.208, which governs the application of the "good faith" requirement to acceleration clauses, states that a term providing that one party may accelerate payment at will or when he deems himself insecure "shall be construed to mean that he shall have the power to do so only if he in good faith believes that the prospect of payment or performance is impaired." The Official Comment to section 1.208 notes the following exception:

> Obviously this section has no application to demand instruments or obligations whose very nature permits call at any time with or without reason.

(footnote continued from previous page)

> that MBank failed to act in good faith in connection with its banking transactions with Taylor?
>
> Answer "yes" or "no" to (a) and (b):
>
> (a) Comite accounts: Yes
> (b) Acceleration of the Jaguar and boat loans: Yes
>
> You are instructed that "good faith" means honesty in fact in the conduct or transaction concerned. The test for good faith is the actual belief of the party in question and not the reasonableness of that belief. You are also instructed that in order to find that MBank breached a duty to act in good faith you must find that the failure or failures to act in good faith, if any, were the natural, probable and foreseeable consequences of MBank's actions.

We begin, therefore, with an examination of the loan documents to determine whether they clearly gave MBank complete discretion to demand payment at any time with or without cause. Taylor executed two promissory notes in favor of MBank for the purchase of a Jaguar automobile and a Sea Ray yacht. Except for the installment payment amounts and maturity date, the two promissory notes contain virtually identical provisions. Each note contains a monthly payment schedule, an acceleration clause and a demand clause. The demand clause states that "this obligation is, as an alternative to the above-recited payment schedule, due and payable on demand." A similar demand provision is recited on the reverse side of the note. The notes also contain an acceleration clause. Under the acceleration clause, the bank is entitled, at its option, to accelerate the unpaid principal balance and accrued interest "if default occurs in the punctual payment of any installment of principal or interest, . . . or upon the occurrence of a default under the terms of any and all agreements or instruments securing . . . the indebtedness, or if at any time the [bank] . . . deems itself insecure. " In addition to the default provisions contained in the acceleration clause, the bank's security agreements and mortgage securing the debt list various "events of default" which could result in the bank declaring the entire obligation immediately due and payable.

The FDIC argues that the demand feature permitted MBank to demand payment at any time with or without reason. The only Texas case cited by the FDIC on this point is *Conte v. Greater Houston Bank*, 641 S.W.2d 411 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.). In *Conte*, the court was

faced with a promissory note which provided that payment was due "ON DEMAND, BUT IF NO DEMAND IS MADE: principal and interest shall be due and payable in monthly installments . . . ." *Id.* at 412. The maker of the note argued that since the bank accepted monthly installment payments without demanding payment before they were due, the bank no longer retained the right to make a demand under the demand clause. The court rejected this argument stating that "it was proper to construe the note 'payable, at the convenience of the holder, either on demand or in installments . . . .'" *Id.* at 418, *quoting C & Z, Inc. v. Oklahoma Tax Comm'n*, 459 P.2d 601(Okl. 1969).

Despite some similarity between *Conte* and the present case, there are important differences. Unlike the present situation, there is no indication that the note in *Conte* contained an acceleration clause. It also does not appear that the note was accompanied by an underlying security agreement or included term which would modify the right of demand. Here, in contrast, the existence of explicit conditions of default in the acceleration clause, as well as the related security agreements, shows a clear intention that the note be payable on demand only in the event Taylor failed to meet the installment obligations or the obligations imposed by the security agreements. In construing a similar loan agreement, the court in *Reid v. Key Bank of Southern Maine, Inc.*, 821 F.2d 9, 14 (1st Cir. 1987) noted that:

> The presence of such conditions in both documents indicates that the agreement could not simply be terminated at the whim of the parties; rather, the right of termination was

subjected to various limitations. The detailed enumeration of events that would "render" the note "payable on demand," or which would put Reid in "default," shows the qualified and relative nature of any "demand" provision.

As applied to the facts of this case, we find the *Reid* decision persuasive. Demand instruments, by definition, are payable on demand and are considered due immediately when executed. *Leinen v. Buffington's Bayou City Service, Co.*, 824 S.W.2d 682, 684 (Tex. App.--Houston [14th Dist.] 1992, no writ); *Davis v. Dennis*, 448 S.W.2d 495, 497 (Tex. Civ. App.--Tyler 1969, no writ). If a demand obligation was indeed intended, as suggested by the FDIC, the conditions for acceleration stated in MBank's agreements with Taylor would be meaningless. The bank could simply demand payment immediately regardless of whether any of the specified default conditions occurred. This does not appear to be the reasonable intent and expectations of the parties. In fact, the former president of MBank, Ed Evans, testified at trial that the bank could not simply demand payment on an "unreasonable basis," but was obligated to consider, in good faith, all the facts and circumstances before accelerating the note.

Based upon the testimony and our reading of the loan documents, we determine that although these notes profess to be demand instruments, a fair reading of the notes and related security agreements demonstrates an intention that these installment notes be payable on demand only in the event of default. This construction comports with the common expectation that a promissory note with an installment feature and an acceleration clause is a time obligation

and that the bank does not have the right to demand payment in absence of default. For the reasons stated, we find under the facts of this case that the trial court's instruction on "good faith" was proper.

VI. THE YACHT FORECLOSURE

The FDIC argues that the pendency of the maritime action in federal court precluded recovery on Taylor's claim for bad faith foreclosure because such a claim was a compulsory counterclaim under the Fed. R. Civ. P. Rule 13(a). Taylor, however, plead this counterclaim in both the federal and state court actions. Because the state action was tried first, Taylor's counterclaim was never adjudicated in the federal court action. Therefore, contrary to the FDIC's assertions, Taylor never waived this claim, and it was properly considered in the state action. *See Southern Constr. Co., Inc. v. Pickard*, 371 U.S. 57, 60-61 (1962).

VII. PUNITIVE DAMAGES

The district court awarded Taylor $5.2 million in punitive damages and additional damages under section 17.50(b)(1) of the DTPA.[16] The FDIC maintains that because the FDIC is an instrumentality of the United States, sovereign immunity requires a reversal of that award. Taylor does not dispute that the FDIC is immune from suit, but argues that the FDIC, as the receiver of MBank, should not be

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16. Treble damages under the DTPA are punitive in nature under Texas law. *Pace v. State*, 650 S.W.2d 64, 65 (Tex. 1983).

permitted to assert new defenses unique to its status when it intervenes post-judgment.

Before considering the merits of these arguments, we briefly review the procedural posture in which this issue is presented to us on appeal. MBank raised the issue of punitive damages for the first time in its motion for new trial and motion to modify, correct, or reform the judgment filed within 30 days after judgment was entered in state court. These motions were later adopted by the FDIC when it intervened in the state court action, and presented to the district judge once the case was removed to federal court. Following removal, the state court motion to modify, correct, or reform the judgment was reformed by the parties to comply with the federal rules and was considered by the district court as a Rule 59(e) motion to alter or amend judgment. The district court later denied both the Rule 59(e) motion and the motion for new trial. We emphasize the fact that the FDIC raised the punitive damage issue in the district court while that court still had under consideration the timely filed motion for new trial and to alter or amend judgment filed by MBank. Because the motions were filed before the time for filing a notice of appeal had expired, the issue was raised in the trial court when there was no final unappealable judgment.[17]

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17. A remarkably different situation would have been presented had the FDIC filed its motions after the judgment had become final and unappealable. *See* 12 U.S.C. § 1821(d) (13) (A) ("The Corporation shall abide by any final unappealable judgment of any court of

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Turning to the merits of the case, the question we are asked to decide is whether the FDIC, as a post-judgment intervenor, can assert sovereign immunity as a defense for the first time in a Rule 60(b) motion before the judgment in the district court becomes final and unappealable.[18] Sovereign immunity is a jurisdictional bar to those suits "that are prosecuted against the United States." *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 412 (1821). Even if the United States was not named as a party in the original action, "'if the judgment sought would expend itself upon the public treasury or domain, or interfere with public administration,'. . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act . . . ,'" the suit will be construed as one against the United States requiring a waiver of sovereign immunity. *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337

(footnote continued from previous page)

competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver").

18. The FDIC's assertion of its immunity defense presented in its motion to alter or amend judgment is properly treated as a Rule 60(b) motion for relief from judgment since it was made more than ten days after the entry of judgment. *Laverspere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990). Such a motion is addressed to the sound discretion of the trial court and will not be overturned unless there is a showing of an abuse of that discretion. *Williams v. Brown & Root, Inc.*, 828 F.2d 325, 328 (5th Cir. 1987); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

U.S. 682, 704 (1949); *Land v. Dollar*, 330 U.S. 731, 738 (1947)); *Van Drasek v. Lehman*, 762 F.2d 1065, 1069 (D.C. Cir. 1985); *see also Alabama Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1225 (5th Cir. 1976). "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States v. Mitchell*, 445 U.S. at 538 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Where no such consent exists, sovereign immunity operates as a jurisdictional bar. *United States v. Mitchell*, 445 U.S. at 538; *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1156 (5th Cir. 1981).

It is established law that agencies of the United States cannot be held liable for punitive fines or assessments absent express Congressional authorization. *Missouri Pac. R.R. v. Ault*, 256 U.S. 554, 563-65 (1921); *Commerce Federal Sav. Bank v. Federal Deposit Ins. Corp.*, 872 F.2d 1240, 1247-48 (6th Cir. 1989); *Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n*, 885 F.2d 266, 273 (5th Cir. 1989); *Painter v. Tennessee Valley Authority*, 476 F.2d 943, 944 (5th Cir. 1973). Taylor does not dispute that the FDIC is an instrumentality of the United States, *see Commerce Federal Sav. Bank v. Federal Deposit Ins. Corp.*, 872 F.2d at 1248, nor does she cite any express Congressional authority permitting the imposition of punitive fines or penalties against the FDIC. She merely contends that the FDIC cannot assert its sovereign immunity defense for the first time when it intervenes after judgment.

In support of her contention, Taylor relies on *Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n*, 885 F.2d 266 (5th Cir. 1989). In *Olney*, Olney Savings sued Trinity Banc and its related mortgage company

seeking rescission of their agreement to finance the purchase of certain townhouses. The district court entered judgment of rescission on the jury's finding of fraud. Trinity Banc and the mortgage company posted a supersedeas bond to stay execution of the judgment and perfected their appeal. While the case was on appeal, FSLIC was appointed conservator of the insolvent Trinity Banc. Relying on *Grubb v. Federal Deposit Ins. Corp.*, 833 F.2d 222 (10th Cir. 1987), this court held that when the bond was posted by Trinity Banc and the mortgage company, the funds ceased to be assets of the insolvent institutions, and therefore were not a part of the conservatorship estate. Because the bond was no longer an asset available to the FSLIC for distribution, we said "its use as punitive damages does not tax an agency of the United States nor offend sovereign immunity." *Olney*, 885 F.2d at 274. In this case, however, no supersedeas bond was posted from which the punitive damage award could be satisfied. The punitive damages would therefore be drawn from assets available for distribution by the receiver and would not only "interfere with the public administration" of the assets of the receivership estate, but would likely "expend itself on the public treasury" by increasing the loss to the insurance fund. *Dugan*, 372 U.S. at 620; *Federal Deposit Ins. Corp. v. Claycomb*, 945 F.2d 853, 861 (5th Cir. 1991). Because Taylor has failed to indicate how the punitive damage award could be secured without affecting the receivership estate, we find the *Olney* decision inapplicable to the present circumstances.

We likewise reject Taylor's argument that sovereign immunity cannot be raised by the FDIC post-judgment. Sovereign immunity is a jurisdictional prerequisite which may be asserted at any stage of the

proceedings, either by the parties or by the court on its own motion. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 586-87 (1941); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reserv.*, 673 F.2d 315, 318 (10th Cir. 1982); *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154 n.1 (9th Cir. 1979); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3654, at 186-90 (1985). Here, the FDIC asserted its sovereign immunity defense in the district court before a final unappealable judgment had been taken, and therefore properly raised and preserved the question of sovereign immunity for the court's consideration. Inasmuch as the punitive damages would operate against the United States, and there being no express Congressional waiver of sovereign immunity, we conclude that the district court abused its discretion in denying the FDIC's motion for relief from judgment on this issue.

VIII. DUPLICATIVE DAMAGES

Next, the FDIC complains that the judgment should be vacated to remove duplicative damage awards for the loss of the drilling prospects as well as the wrongful acceleration of the car and yacht notes. The jury answered seven special issues submitted on actual damages. In rendering its verdict, the jury found MBank liable for (1) $350,000 in actual damages for each of the two DTPA violations; (2) $300,000 in actual damages for the bank's failure to act in good faith in reference to the Comite accounts; (3) $75,000 in actual damages for the bank's failure to act in good faith in accelerating the Jaguar and yacht loans; (4) $1,000,000 in actual damages for tortiously interfering in the business affairs of Taylor; (5) $10,000 in actual damages for converting Taylor's

personal property from the yacht; and (6) $500,000 in actual damages for conspiracy.

In its brief, the FDIC makes a generalized allegation that these damage awards amount to a double recovery. While we agree that a party "cannot recover the same damages twice, even though the recovery is based on two different theories," *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987), the FDIC fails to identify which of the various damage awards involved amount to identical damage awards or even discuss the pertinent case law concerning this issue. Instead, the FDIC simply proclaims, without explanation, that the "judgment for loss of the drilling prospects should be limited to one award of $300,000 . . . ." (Appellants' Br. at 41). To decide whether the jury erroneously awarded double damages would require us not only to speculate which damage award the FDIC claims to be duplicative, but also to determine whether the jury intended to make separate and distinct findings for each act or omission and, if not, to elect the recovery which affords the greater recovery. We decline to address these points without the benefit of full and complete briefing of the issues and therefore consider the FDIC's duplicative damage argument waived. *In re HECI Exploration Co., Inc.*, 862 F.2d at 525; *Morrison v. City of Baton Rouge*, 761 F.2d at 244.

IX. NEW TRIAL

The FDIC finally argues that the district court erred indenying its motion for new trial, alleging that the jury verdict was against the great weight of the evidence. The decision whether to grant or deny a

motion for new trial is within the sound discretion of the district court. *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 164 (5th Cir. 1990); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1043 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985). As an appellate court, we review the exercise of that discretion under an abuse of discretion standard and will overturn a district court's denial of a motion for new trial only if there is an "'absolute absence of evidence to support the jury's verdict.'" *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1140 (5th Cir. 1991) (citing *Cobb v. Rowan Companies, Inc.*, 919 F.2d 1089, 1090 (5th Cir. 1991)). As discussed in the preceding sections of our opinion, the record clearly contains evidence to support the jury verdict. We therefore affirm the trial court's denial of the plaintiff's motion for new trial.

X. ATTORNEY'S FEES

Bank One, successor-in-interest to MBank, claims it is entitled to recover attorney's fees for MBank's collection of the $90,000 and $50,000 notes which Taylor admitted she owed. Under Texas law, a party is permitted to recover attorney's fees only if they are authorized by contract or by statute. *New Amsterdam Casualty Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967); *4M Linen & Uniform Supply Co., Inc. v. W.P. Ballard & Co., Inc.*, 793 S.W.2d 320, 327 (Tex. App.--Houston [1st Dist.] 1990, no writ). In its petition, MBank did not plead that it was entitled to recover attorney's fees under any Texas statute. Rather, it relied on the contractual language of the promissory notes as a basis for recovery. At the conclusion of the trial, the state court denied MBank's requested offset to the

judgment in the amount of $76,748.50, representing MBank's claim for attorney's fees on the $90,000 and $50,000 notes. Bank One maintains that the state court's denial of the entirety of MBank's attorney's fees was in error. Taylor apparently concedes this point, but argues that since the bank failed to check a box on the face of the $90,000 note allowing for the collection of attorney's fees, Bank One's claim for attorney's fees should be properly apportioned between the two notes. We agree. Ordinarily, where a case involves more than one claim, attorney's fees can be awarded only for necessary legal expenses incurred in connection with the claims for which recovery is authorized. *Ralston Oil and Gas Co. v. Gensco, Inc.*, 706 F.2d 685, 697 (5th Cir. 1983); *International Security Life Ins. Co. v. Finck*, 496 S.W.2d 544, 546-47 (Tex. 1973). We therefore remand this claim to the trial court for hearing to determine the amount of attorney's fees, if any, recoverable for services rendered to collect the unpaid balance of the $50,000 promissory note.

CONCLUSION

The jury correctly found that MBank did not give valid consideration for the release. MBank's claim for attorney's fees for institution of the interpleader action was not made in good faith, and MBank knew or should have known that the claim was without foundation. There is also ample evidence to support the jury's determination that the account freeze was a producing cause of Taylor's loss in the two drilling prospects.

With respect to the two promissory notes, we hold that MBank had the right to demand payment

only if the bank believed in good faith that the prospect of payment or performance was impaired. Taylor, however, is not entitled to an award of punitive damages because the FDIC, as an agency of the United States, is immune from such damages. We, therefore, AFFIRM the judgment of the district court to the extent it upheld the findings of the jury, but REVERSE the judgment of the district court to the extent it granted recovery against the FDIC for punitive damages. We REMAND to the district court for the limited purpose of issuing a final judgment, including interest and costs, and, if proper, attorney's fees consistent herewith.

SO ORDERED.

APPENDIX B

NO. 85-29591-A

MBANK GREENS PARKWAY, N.A. and WORTH ENERGY CORPORATION,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	
SUZAN E. TAYLOR D/B/A EXPLORATION SERVICES,	§	HARRIS
	§	COUNTY, TEXAS
Defendant, Counter-Plaintiff, and Third Party Plaintiff,	§	
v.	§	
WORTH OPERATING, INC., AARON W. HEES, and JIM W. HOWARD,	§	
Third Party Defendants.	§	152ND JUDICIAL DISTRICT

FINAL JUDGMENT

On the 9th day of January, 1989, this case came on to be heard in its regular order. The Court is aware that Plaintiff, Worth Energy Corporation ("Worth Energy"), and Third Party Defendants, Aaron W. Hees ("Hees"), and Jim W. Howard ("Howard"), have each filed a separate petition in

bankruptcy in the United States Bankruptcy Court for the Western District of Texas, Austin Division. However, in each case, the Bankruptcy Court has lifted the automatic stay so that this cause could proceed to trial. The claims against Third Party Defendant Boguslaw Burczak have been severed to a separate cause.

Plaintiff, MBank Houston, N.A. ("MBank") appeared by and through its attorneys of record, announced ready for trial, and announced that it was the successor-in-interest to MBank Greens Parkway, N.A. and MBank Greenspoint, N.A. Worth Energy, and Defendant, Counter-Plaintiff, and Third Party Plaintiff, Suzan E. Taylor d/b/a Exploration Services ("Taylor"), appeared by and through their respective attorneys of record, and announced ready for trial. Third Party Defendants, Worth Operating, Inc., Hees, and Howard, did not appear for trial. The Court had previously entered an interlocutory judgment by default against Hees, which default judgment has become final by virtue of this Judgment.

A jury consisting of twelve good and lawful men and women was impaneled and sworn. Although Worth Energy participated in the voir dire of the jury, Worth Energy, through its counsel, subsequently announced that it would take a nonsuit against Taylor and declined to be present for the remainder of the trial.

MBank and Taylor made opening statements, and presented evidence in support of their respective claims and counterclaims. Thereafter, MBank presented rebuttal evidence. At the close of the

evidence, MBank presented a Motion for Directed Verdict against certain counterclaims of Taylor, which Motion was denied. Taylor then presented a Motion for Directed Verdict on certain claims against Worth Energy, Hees, and Howard, which Motion was granted on the ground that the evidence presented in support of the claims by Taylor against Worth Energy, Hees, and Howard, was uncontroverted. All parties rested. The Court then instructed the jury according to law and submitted the case to the jury on special issues. After closing argument, the jury retired to consider its verdict.

On the 21st day of February, 1989, the jury returned its findings in open Court. The verdict was received by the Court and filed and entered of record in the minutes of the Court. The Court has considered the pleadings on file in this case, the proof and evidence presented at trial, the stipulations of the parties, the verdict of the jury, and all other matters of record. The Court is of the opinion that a Judgment should be entered accordingly. Therefore, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover of and from MBank the total sum of Seven Million One Hundred Fifty Thousand Four Hundred Seventy-Nine and 84/100 Dollars ($7,150,479.84). Such amount consists of the following:

1. Damages in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00), for representing that its banking services were of a particular standard, quality or grade when they were of another;

2. Damages in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00), for committing an unconscionable action or course of action in connection with furnishing banking services to Taylor;

3. Damages in the sum of Three Hundred Seventy-Five Thousand Dollars ($375,000.00) for failure to act in good faith in connection with its banking transactions with Taylor;

4. Damages in the sum of One Million Dollars ($1,000,000.00) for tortious interference with Taylor's business relationships;

5. Prejudgment interest at the rate of ten percent (10%) compounded daily from January 1, 1985 through February 27, 1989, which amount is One Million Sixty-Nine Thousand Nine Hundred Thirty-Nine and 34/100 Dollars ($1,069,939.34);

6. Damages in the sum of Ten Thousand Dollars ($10,000.00) for conversion of Taylor's personal property;

7. Prejudgment interest at the rate of ten percent (10%) compounded daily from May 20, 1985 through February 27, 1989, which amount is Four Thousand Five Hundred Ninety and 08/100 Dollars ($4,590.08);

8. Additional damages in the sum of One Million Four Thousand Dollars ($1,004,000.00) pursuant to section 17.50(b)(1), Texas Business and Commerce Code;

9. Exemplary damages in the sum of Two Million Five Hundred Ten Thousand Dollars ($2,510,000.00); and

10. Attorneys' fees in the trial court in the amount of Six Hundred Seventy-Five Thousand Dollars ($675,000.00);

11. Less offset for indebtedness owed by Taylor to MBank in the sum of Ninety Thousand Eight Hundred Fifty and 69/100 Dollars ($90,850.69) plus interest at the rate of ten percent per annum (10%) from March 1, 1985 through February 27, 1989, which amount is Thirty-Six Thousand Three Hundred Fifteen and 39/100 Dollars ($36,315.39);

12. Less offset for indebtedness owed by Taylor to MBank in the sum of Fifty Thousand Four Hundred Eighty-Two and 88/100 Dollars ($50,482.88) plus interest at the rate of ten percent per annum (10%) from February 13, 1985 through February 27, 1989, which amount is Twenty Thousand Four Hundred and 62/100 Dollars ($20,400.62). Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover of and from MBank, Worth Energy, and Hees jointly and severally, the total sum of Two Million Four Hundred Eighty-Nine Thousand Three Hundred Sixty-One and 81/100 Dollars ($2,489,361.81). Such amount consists of the following:

1. Damages in the sum of Five Hundred Thousand Dollars ($500,000.00) for conspiracy;

2. Prejudgment interest at the rate of ten percent (10%) compounded daily from April 1, 1985 through February 27, 1989, which amount is the sum Two Hundred Thirty-Nine Thousand Three Hundred Sixty-One and 81/100 Dollars ($239,361.81); and

3. Exemplary damages in the sum of One Million Seven Hundred Fifty Thousand Dollars ($1,750,000.00). Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover of and from Worth Energy, Hees, and Howard, jointly and severally, the total sum of One Million Forty Six Thousand Six Hundred Eighty Five and 55/100 Dollars ($1,046,685.55). Such liability is premised on the following findings:

1. On July 23, 1984, Taylor entered into a contract with Worth Energy by which Taylor agreed to provide certain geological

and geophysical consulting work for Worth Energy ("the Contract");

2. Worth Energy and Hees induced Taylor to enter into the Contract by representing to her that she would receive the consideration set forth in the Contract, including (a) carried working interests in wells drilled pursuant to the Contract; (b) $500,000 in five equal installments; and (c) fifty percent of the promotion profits earned by Worth Energy for each well completed. Additionally, Worth Energy agreed to bear certain expenses incurred in connection with the performance of services pursuant to the Contract;

3. Taylor performed the services required of her under the Contract;

4. Worth Energy did not provide Taylor the full consideration set forth in the Contract, including reimbursement to Taylor for certain expenses and payment of promotion profits;

5. Hees and Howard are the alter ego of Worth Energy and are jointly and severally liable for the indebtedness of Worth Energy;

6. Worth Energy, Hees, and Howard, are liable to Taylor, jointly and severally, for damages for breach of contract in the total sum of Five Hundred Seventy-Five

Thousand One Hundred Twenty-Nine and 54/100 Dollars ($575,129.54) as follows:

(a) expenses due and owing to Taylor, in the amount of Ninety-One Thousand Forty-Eight and 24/100 Dollars ($91,048.24), all credits and offsets having been made;

(b) promotion profits due and owing to Taylor, in the amount of Three Hundred Fifty-Two Thousand Five Hundred Sixty-Three and 67/100 ($352,563.67); and

(c) production income due and owing to Taylor from the Byington-Hollar well, in the net amount of One Hundred Thirty-One Thousand Five Hundred Seventeen and 63/100 Dollars ($131,517.63);

7. Additionally, breach of the Contract with Taylor by Worth Energy, Hees, and Howard, was intentional and constitutes willful and malicious injury to Taylor and her property;

8. Worth Energy and Hees obtained Taylor's consulting services, geological and geophysical data, and property through their representations, set forth in the Contract and orally, that they would pay Taylor the consideration set forth therein;

9. In addition, Worth Energy and Hees committed fraud by inducing Taylor to enter into the Contract by representing that certain investor funds were available to finance Worth Energy's drilling of wells;

10. The representations made by Worth Energy and Hees regarding Taylor's compensation as set forth in the Contract, as well as the representations regarding the availability of investor funds, were false;

11. Worth Energy and Hees made these misrepresentations to Taylor with the knowledge that they were false and with the intention of deceiving Taylor. Taylor reasonably relied on those misrepresentations in entering into the Contract and providing her services to Worth Energy and Hees and in undertaking obligations on their behalf;

12. Worth Energy's and Hees' misrepresentations to Taylor, made to induce her to provide property and services, were made willfully, maliciously, intentionally, and deliberately, so as to injure Taylor and her property;

13. As a direct and proximate result of (a) her reliance on the misrepresentations of Worth Energy and Hees, and (b) the injuries inflicted upon Taylor by the willful, malicious, intentional, and deliberate acts of Worth Energy, Hees, and

Howard, Taylor has suffered damages in the sum of Five Hundred Seventy-Five Thousand One Hundred Twenty Nine and 54/100 Dollars ($575,129.54);

14. Worth Energy, Hees and Howard are liable to Taylor, jointly and severally, for prejudgment interest at the rate of ten percent (10%) compounded daily from January 1, 1985 through February 27, 1989, which amount is Two Hundred Ninety-Six Thousand Five Hundred Fifty-Six and 01/100 Dollars ($296,556.01); and

15. Worth Energy, Hees and Howard are liable to Taylor, jointly and severally, for attorneys' fees in the trial court in the amount of One Hundred Seventy-Five Thousand Dollars ($175,000.00), incurred in connection with Taylor's claim for breach of contract. Moreover, such attorneys' fees are recoverable for the fraudulent and tortious actions of Worth Energy and Hees inasmuch as the trial of Taylor's fraud and tort actions against Worth Energy and Hees was so intertwined with the trial of her contract action as to render such actions inseparable. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover of and from MBank the additional sum of Sixty-Five Thousand Dollars ($65,000.00) as reasonable attorneys' fees in the event

that MBank takes an appeal from this Judgment to the Court of Appeals. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover of and from MBank the additional sum of Fifteen Thousand Dollars ($15,000.00) as reasonable attorneys' fees in the event that an application for writ of error is filed in the Supreme Court of Texas. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover, jointly and severally from the appealing party or parties, the additional sum of Sixty Five Thousand Dollars ($65,000.00) as reasonable attorneys' fees in the event that Worth Energy, Hees, or Howard, takes an appeal from this Judgment to the Court of Appeals. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover, jointly and severally from the appealing party or parties, the additional sum of Fifteen Thousand Dollars ($15,000.00) as reasonable attorneys' fees in the event that an application for writ of error is filed in the Supreme Court of Texas by Worth Energy, Hees, or Howard. Further, it is

ORDERED, ADJUDGED AND DECREED that MBank take nothing on its claims for deficiency on the note secured by Taylor's Jaguar, on its claims for attorneys' fees, on its claims for breach of the settlement agreement, on its claims for fraud and misrepresentation, and on its claims for exemplary damages. Further, it is

ORDERED, ADJUDGED AND DECREED that Worth Energy take nothing by way of its First Amended Original Petition and that all relief prayed for therein is denied. Further, it is

ORDERED, ADJUDGED AND DECREED that all relief which is not specifically granted in this Judgment should be, and is hereby denied. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor is entitled to all writs and processes for the enforcement and collection of this Judgment allowed by law, including, but not limited to, the right to levy against the property of MBank, Worth Energy, Hees, or Howard, and recovery of all costs of Court allowed by law for the collection of this Judgment. Further, it is

ORDERED, ADJUDGED AND DECREED that all amounts awarded in this Judgment shall bear interest at the rate of ten percent per annum (10%) from the date of this Judgment until paid. Further, it is

ORDERED, ADJUDGED AND DECREED that Taylor shall recover costs of Court from MBank, Worth Energy, Hees, and Howard, jointly and severally.

SIGNED this 27 day of February, 1989.

/s/ Jack O'Neill
JACK O'NEILL
DISTRICT JUDGE

APPROVED AS TO FORM:

BUTLER & BINION

By: _____

Hayden Burns
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ATTORNEYS FOR MBANK HOUSTON, N.A.

APPENDIX C

MEMORANDUM TO COUNSEL
OR PARTIES LISTED BELOW:

No. 90-2654 - BANK ONE v. TAYLOR
DC NO. CA-H-89-1463

The following action has been taken in the above case:

[X] AN EXTENSION OF TIME has been granted to and including *SEPTEMBER 15, 1992

- [ ] for filing appellant's/petitioner's brief.
- [ ] for filing appellee's/respondent's brief.
- [ ] for filing reply brief.
- [X] for filing petition for rehearing. (APPELLEE)
- [ ]

[ ] Motion to consolidate granted.

[ ] Motion to supplement or correct the record granted.

[ ] Motion for leave to file supplemental brief granted.

[ ] Motion for leave to file brief *amicus curiae* is granted.

☐ Joint Motion as to time for filing briefs granted.

☐ Order enclosed has been entered.

☐

GILBERT F. GANUCHEAU,
Clerk

By: s/ Amanda S. Davis
Deputy Clerk

*MUST BE PHYSICALLY FILED
IN THIS OFFICE ON DUE DATE.

/asd
cc: Mr. Robert D. Daniel
Mr. Hayden Burns

U.S. COURT OF APPEALS
FILED
NOV 10 1992
RICHARD E. WINDHORST, JR.
CLERK

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90-2654

BANK ONE, TEXAS, N.A., and
FEDERAL DEPOSIT INSURANCE
CORPORATION, as receiver for
MBANK HOUSTON, N.A.,

Plaintiffs-Third Party
Defendants-Appellants,

versus

SUZAN E. TAYLOR d/b/a
EXPLORATION SERVICES,

Defendant-Third Party
Plaintiff-Appelle,

versus

WORTH OPERATING, INS., ET AL.,

Third Party Defendants.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 8/18/92, 5 Cir., 199_____, _____F. 2d_____)

( )

Before REYNALDO G. GARZA, GARWOOD, AND MAHON*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no ~~member~~ of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the ~~members~~ of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this

cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

*District Judge of the Northern District of Texas, sitting by designation.

Supreme Court, U.S.
1993
CLERK

No. 92-1284

In the Supreme Court of the United States

OCTOBER TERM, 1992

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
PETITIONER

v.

BANK ONE, TEXAS, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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ALFRED J.T. BYRNE
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COLLEEN B. BOMBARDIER
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ROBERT D. MCGILLICUDDY
Deputy Senior Counsel

GREGORY E. GORE
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether the Federal Deposit Insurance Corporation as receiver was immune from punitive damages awarded under state law where it became receiver for the financial institution against which the damages were awarded before entry of a final unappealable judgment awarding such damages.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1284

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
PETITIONER

v.

BANK ONE, TEXAS, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 970 F.2d 16. The order of the federal district court and the judgment of the state district court (Pet. App. B1-B13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1992. A petition for rehearing was denied on November 10, 1992. Pet. App. D1-D3. The petition for a writ of certiorari was filed on February 1, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner entered into an agreement to purchase certain drilling rights from C.I. Oil, Inc., and deposited funds in MBank to be used for that purchase. Thereafter, petitioner and CI disagreed about the arrangement, petitioner refused to authorize MBank to disburse the funds, and CI advised MBank that it would hold MBank liable if MBank did not disburse the funds. MBank then froze the account and demanded that petitioner settle her dispute with CI. When petitioner subsequently instructed MBank to release the funds to CI, MBank refused and filed an interpleader action in state trial court, insisting that petitioner and CI resolve their repeated differences. After petitioner and CI settled their differences, MBank again refused to release the funds or dismiss its action until petitioner released it from liability. When petitioner agreed to release MBank from liability, MBank released the funds and dismissed the interpleader action. Pet. App. A2-A4.

2. The day after the interpleader action was dismissed, MBank accelerated the date of maturity on two secured loans to petitioner and demanded that petitioner repay those loans and two other unsecured loans within five days. After liquidating the collateral for the two secured loans, MBank commenced an action against petitioner in the state district court in Harris County, Texas, seeking a deficiency judgment on one of the secured loans, as well as recovery on the two unsecured loans. Petitioner filed counterclaims, alleging that the release of MBank she signed in

connection with the interpleader action had been induced by fraud and economic duress; that MBank had acted tortiously in freezing her accounts; that MBank had acted wrongfully in accelerating the date of maturity of her loans; and that MBank had conspired with her former business partner and violated the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code Ann. §§ 17.41-17.63 (West 1987 & Supp. 1993). Pet. App. A4-A5.

After a seven-week trial, the jury returned a verdict for petitioner on her counterclaims. The trial court entered judgment on the jury verdict, after deducting from the jury award the past due principal and interest on the two unsecured loans. The court entered a take-nothing judgment on MBank's suit for a deficiency on one of the secured loans. The judgment in favor of petitioner totalled $9,639,841.65, including $5.2 million dollars in punitive damages and "additional" damages under the DTPA.[1] MBank filed post-trial motions seeking a new trial and asking the trial court to modify, correct, or reform the judgment. Pet. App. A5-A7; A35-A36.

3. Before the trial court ruled on MBank's post-trial motions, the Office of the Comptroller of the Currency declared MBank insolvent and appointed the FDIC as receiver. The FDIC removed the matter to federal district court. The FDIC and Bank One, N.A. (the successor in interest to MBank as holder of petitioner's loans), filed briefs in support of MBank's

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[1] In certain circumstances, the DTPA authorizes "additional" damages in an amount not to exceed twice the amount of actual damages. See Tex. Bus. & Com. Code Ann. § 17.50(b)(1) (West 1987 & Supp. 1993).

motions, in which the FDIC argued that it was immune from punitive damages in its capacity as receiver. The district court treated the motions as motions to alter or amend the judgment under Fed. R. Civ. P. 59(e) and denied the motions.

4. The court of appeals affirmed the judgment against the FDIC for compensatory damages but reversed the award of punitive damages and additional damages under the DTPA as infringing on the FDIC's immunity from suit, Pet. App. A35-A40. The court explained that petitioner "d[id] not dispute that the FDIC is immune from suit," but argued that the FDIC should not be permitted to interpose the defense of immunity "when it intervenes post-judgment." *Id.* at A35-A36. The court rejected that argument, because the FDIC "raised the punitive damage issue in the district court * * * before the time for filing a notice of appeal had expired, * * * when there was no final unappealable judgment." *Id.* at A36.

The court of appeals also rejected (Pet. App. A38-A39) petitioner's reliance on *Olney Savings & Loan Association* v. *Trinity Banc Savings Association*, 885 F.2d 266 (5th Cir. 1989). In *Olney*, the court ruled that punitive damages could be assessed against a bond that had been posted by a financial institution before a conservator was appointed. The court of appeals in this case explained that *Olney* rested on the conclusion that "when the bond was posted * * * , the funds ceased to be assets of the insolvent institutions, and therefore were not a part of the conservatorship estate." Pet. App. A39. In this case, by contrast, any judgment "would * * * be drawn from

assets available for distribution by the receiver" and thus improperly would infringe on the receiver's immunity from suit. *Ibid.*

Finally, the court rejected (Pet. App. A39-A40) petitioner's argument that the immunity defense could not be raised after judgment, explaining that the defense "is a jurisdictional prerequisite which may be asserted at any stage of the proceedings, either by the parties or by the court on its own motion." *Ibid.*

ARGUMENT

Petitioner argues (Pet. 7-9) that the FDIC's assertion of its immunity defense was too late to be effective. We disagree. As a matter of federal common law, the federal courts traditionally have declined to allow the imposition of punitive damages on federal receivers.[2] The rule rests on the view that punitive damages are intended to punish a wrongdoer and deter future conduct, purposes that would not be furthered by depleting the estate of a failed enterprise. The assessment of punitive damages against a receiver would punish only the innocent creditors of the enterprise. See, *e.g.*, *FDIC* v. *Claycomb*, 945 F.2d 853, 861 (5th Cir. 1991) (a "claim which is punitive in nature * * * cannot be asserted against the FDIC as

[2] Although petitioner suggests (Pet. 5-6) that the FDIC as receiver is not entitled to immunity, that question is not properly presented. As the court of appeals understood petitioner's arguments below, petitioner "d[id] not dispute that the FDIC is immune from suit." Pet. App. A35. Accordingly, the question is not properly before the Court. Compare *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991). In any event, for the reasons summarized in the text, the claim is meritless.

such application could have no deterrent effect, and would only serve to punish innocent creditors"), cert. denied, 112 S. Ct. 2301 (1992); *Commerce Federal Savings Bank* v. *FDIC*, 872 F.2d 1240, 1247-1248 (6th Cir. 1989); *Anderson* v. *Hershey*, 127 F.2d 884, 887 (6th Cir. 1942) ("But when the bank is in receivership any depletion of the estate over and above [compensatory relief] will affect creditors and depositors who were in no way connected with or responsible for the usurious transaction.").[3]

Petitioner offers no substantial support for the argument (Pet. 7-9) that the defenses that otherwise would be available to the receiver are vitiated if the receiver is not appointed before the trial court's judgment is entered. To the contrary, in cases where the Resolution Trust Corporation (RTC) and the FDIC have special federal defenses that were not available to a failed institution at the time of trial (because the federal entity became a party to the case after the trial), the courts consistently have allowed the federal entity to raise such defenses for the first

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[3] See also *RTC* v. *Mooney*, 592 So. 2d 186, 189-190 (Ala. 1991) (RTC as receiver not subject to punitive damages because the damages would have no deterrent value and would punish innocent depositors and creditors); *Lane* v. *Schilling*, 279 P. 267, 270 (Or. 1929) (incorrect to impose punitive damages on receiver of failed national bank); *Professional Asset Management, Inc.* v. *Penn Square Bank, N.A.*, 566 F. Supp. 134, 136-137 (W.D. Okla. 1983) (punitive damages against FDIC as receiver barred because "an award of punitive damages against the receiver would not punish the Bank, but its innocent creditors and uninsured depositors"); *Tuxedo Beach Club Corp.* v. *City Fed. Sav. Bank*, 749 F. Supp. 635, 649-650 (D.N.J. 1990).

time on appeal. See, *e.g.*, *In re 604 Columbus Avenue Realty Trust*, 968 F.2d 1332, 1342-1344 (1st Cir. 1992) ("[I]t would have been unfair to prevent the FDIC from raising its federal defenses when it had no * * * opportunity to assert them before the bankruptcy court."); *5300 Memorial Investors, Ltd.* v. *RTC* (*In re 5300 Memorial Investors, Ltd.*), 973 F.2d 1160, 1163-1164 (5th Cir. 1992); *RTC* v. *McCrory*, 951 F.2d 68, 71 (5th Cir.) ("[T]he federal regulator had no opportunity to raise its special defense in the trial court, and * * * it should not be penalized on appeal for that lack of opportunity."), cert. denied, 113 S. Ct. 459 (1992); *Baumann* v. *Savers Federal Savings & Loan Association*, 934 F.2d 1506, 1512-1513 (11th Cir. 1991) ("RTC * * * should not be penalized for not raising a defense it had no opportunity to present."), cert. denied, 112 S. Ct. 1936 (1992); see also *RTC* v. *Winslow*, 12 Cal. Rptr. 2d 510, 516-517 (Ct. App. 1992).[4]

Indeed, as the court of appeals noted (Pet. App. A36 n.17), Congress has now articulated a rule regarding when it is too late for the FDIC to challenge judgments. The FDIC cannot challenge a "final unappealable judgment * * * which was rendered before the appointment of the Corporation as conservator or receiver." 12 U.S.C. 1821(d)(13)(A) (Supp. III 1991).[5]

[4] The Court recently denied a petition arguing that the RTC could not raise its special federal defenses for the first time on appeal. *Ward* v. *RTC*, cert. denied, 113 S. Ct. 1412 (1993).

[5] Section 1821(d)(13)(A) was not enacted until August 9, 1989 (by Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 232), but it apparently did not change the law on this point significantly. A similar result had been reached by

That rule would not have barred the FDIC's claim in this case, because the FDIC interposed its defense before the time for appealing the judgment had passed. See Pet. App. A36. Petitioner's argument that the FDIC was absolutely barred from interposing its defenses by the state trial court's entry of judgment simply ignores the implications of the limitation of the statutory bar (and the prior rule that it codifies, see note 5, *supra*) to a final unappealable judgment.

---

judicial interpretation of 12 U.S.C. 91, which generally bars any attachment of the assets of an insolvent national bank "before final judgment." See also 12 U.S.C. 1819 (Fourth) (1988) (barring any "attachment or execution * * * against the Corporation or its property before final judgment"). As the Fifth Circuit concluded in *United States* v. *Lemaire*, 826 F.2d 387 (1987), cert. denied, 485 U.S. 960 (1988), the reference to a final judgment "means a judgment on the merits which is no longer subject to examination on appeal, either because of disposition on appeal and conclusion of the appellate process, or because of the passage, without action, of the time for seeking appellate review." *Id.* at 390. By deferring execution on a judgment, the statute effectively enables the FDIC to raise new defenses in accordance with the customary rules courts have developed for considering claims not raised in a trial court. As the text explains, those rules generally have been interpreted to allow the FDIC to raise claims on appeal that it did not have an opportunity to present at trial.

We note that petitioner conceded that the state court's judgment did not become final for purposes of 12 U.S.C. 91 in an earlier action by the Comptroller of the Currency to prevent petitioner from creating a lien on MBank's property based on the state trial court's judgment in this case. See *United States* v. *FDIC*, 881 F.2d 207, 209 (5th Cir. 1989) (citing *Lemaire*) ("[Petitioner] does not argue that her judgment is final."), cert. denied, 493 U.S. 1072 (1990).

Petitioner errs in contending (Pet. 7-8) that the FDIC could not raise the claim after the trial court's judgment because the claim would affect the "ratable distribution" of the receivership estate. Taken to its logical conclusion, that argument would mean that the receiver could not appeal *any* trial court judgment. Even petitioner acknowledges that the FDIC could have challenged the award as "undeserved or too severe." Pet. 8. Petitioner articulates no basis for allowing the receiver to challenge the award on those grounds but not allowing it to challenge the award as entirely inappropriate under supervening principles of federal law.

Finally, all three of the cases on which petitioner relies to support her proposed rule (Pet. 9) are decisions of the Fifth Circuit, which at most could establish an intracircuit conflict not worthy of this Court's review. Compare *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, none of those decisions supports petitioner. First, *RTC* v. *McCrory*, *supra*, actually supports the FDIC's position, because, as explained above, it held that the RTC *could* raise a claim on appeal that it did not raise before the trial court entered judgment. Second, as the court of appeals explained (Pet. App. A39), *Olney Savings & Loan Association* v. *Trinity Banc Savings Association*, *supra*, held only that the FDIC's special defenses did not protect an asset that never became part of the conservatorship estate; that rule has no application to petitioner's attempt here to collect punitive damages out of the receivership estate. Finally, *Thurman* v. *FDIC*, 889 F.2d 1441, 1447 (5th Cir. 1989), declined to accept post-judgment

defenses that would not have changed the outcome of the trial court's decision; the defenses in this case would—and did—result in judgment for the FDIC on the claim in question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

ALFRED J.T. BYRNE
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
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ROBERT D. MCGILLICUDDY
Deputy Senior Counsel

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Counsel
Federal Deposit Insurance Corporation

APRIL 1993

Supreme Court, U.S.
FILED
APR 20 1993
OFFICE OF THE CLERK

No. 92-1284

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
Petitioner,

V.

BANK ONE, TEXAS, N.A. and
FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBANK HOUSTON, N.A.
and THE DEPOSIT INSURANCE BRIDGE BANK, N.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

ROBERT HAYDEN BURNS
Butler & Binion
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ATTORNEY FOR PETITIONER

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No. 92-1284

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
Petitioner,

V.

BANK ONE, TEXAS, N.A. and
FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for MBANK HOUSTON, N.A.,
and THE DEPOSIT INSURANCE BRIDGE BANK, N.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

ARGUMENT

The FDIC, in its Brief in Opposition, never addressed the holding of the court of appeals regarding the jury's award of punitive and DTPA damages. The court below said, "Inasmuch as the punitive damages would operate against the United States, and there being no express Congressional waiver of sovereign immunity, ... the district court abused its discretion in denying the FDIC's motion for relief from judgment on this issue." Pet. App. A-40. This holding is so egregiously wrong that the FDIC understandably prefers to ignore it.

The words "sovereign immunity" never appear in the FDIC's brief, and the FDIC made no effort to support the decision below or to explain how, in its status as receiver, it is sovereign. The FDIC never denied that the trial court's judgment was against MBank Houston, N.A. ("MBank") and not against the FDIC in any capacity. And the FDIC never suggested that Taylor's recovery of punitive damages would interfere with public administration or impact the federal treasury. Instead, the FDIC argued, as a matter of policy, that a judgment for punitive damages should not be enforceable against the receivership estate if appeals are pending at the time of insolvency. That policy argument was neither discussed nor decided by the court below.

The FDIC's attempt to distance itself from the opinion below is consistent with the position it has taken since the verdict against MBank. Sovereign immunity was never even mentioned in the post-

verdict motions and was relegated to one sentence in the FDIC's appellate briefs.[1]

The FDIC's one reference to "immunity" in its Brief in Opposition was in the context of a policy discussion of "federal common law" whereby "the federal courts have declined to allow the imposition of punitive damages on federal receivers." Brief in Opposition at 5-6 (citing *FDIC v. Claycomb*, 945 F.2d 853, 861 (5th Cir. 1991); *Commerce Fed. Sav. Bank v. FDIC*, 872 F.2d 1240, 1247-48 (6th Cir. 1989); *Anderson v. Hershey*, 127 F.2d 884, 887 (6th Cir. 1942)). These cases, however, are wholly inapposite and will not support the decision of the court of appeals. Two of the three cases have nothing to do with the issue of sovereign immunity. *See Claycomb*, 945 F.2d 853; *Anderson*, 127 F.2d 884. The third case addresses the liability of the FDIC for its conduct in its corporate capacity -- a critical difference from this case where the FDIC was not sued for either its actions or its status as receiver. *See Commerce Fed. Sav. Bank*, 872 F.2d 1240. Additionally, in none of the cases involving punitive damages cited by the FDIC was the agency appointed as receiver after entry of judgment.

By contrast, in this case, the FDIC was appointed receiver twenty-nine days after a judgment had been entered against MBank for its wrongful conduct. The FDIC has cited no case holding that a judgment for punitive damages signed prior to the

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1. In light of the FDIC's refusal to argue sovereign immunity, it is absurd for that agency to suggest that Taylor has conceded the applicability of the defense. No such concession was made in Taylor's briefs or in the oral argument below..

appointment of a receiver must be set aside for the protection of other creditors of the receivership estate. The policy argument against punitive damages asserted by the FDIC simply has no support in the law.

Like any other receiver, the FDIC takes the receivership estate with the assets and liabilities that existed at the time of insolvency. *United States v. Knox*, 111 U.S. 784, 786-87 (1884); *FDIC v. Wright (In re Still)*, 963 F.2d 75, 77 (5th Cir. 1992); *American Nat'l Bank v. FDIC*, 710 F.2d 1528, 1540 (11th Cir. 1983); *FDIC v. Grella*, 553 F.2d 258, 262 (2d Cir. 1977). Taylor's judgment for punitive damages was a liability of MBank that burdened the estate assumed by the FDIC as receiver. The fact that the judgment was appealable at the time of MBank's insolvency is significant only because the receiver could contest the merits of the judgment while avoiding execution. The appealability of that judgment was not a reason to set it aside.

The FDIC also argues that section 1821(d)(13)(A) of 12 U.S.C.A. (West 1989) (and the prior rule that it codifies) would not bar the FDIC's "claim" in this case, because the defense was asserted before the time for appealing the judgment had passed. Brief in Opposition at 7-8. What the FDIC fails to make clear is that the defense that was interposed was not a sovereign immunity defense, but simply a policy argument that punitive damages are not available against the receiver of a failed institution. Accordingly, by the FDIC's own analysis, the FDIC is barred by section 1821 (and the prior rule that it codifies) from raising the sovereign immunity defense, and the decision of the court of appeals based upon that defense should be reversed.

The cases relating to the FDIC's right to raise its special D'Oench, Duhme[2] and section 1823(e)[3] defenses as a postjudgment intervenor do not support the FDIC's policy arguments that the receivership estate is not liable for a judgment for punitive damages signed prior to insolvency.[4] The right of the FDIC, as receiver, to raise its special defenses for the first time on appeal is limited to those cases in which the judgment was favorable to the bank. *See 5300 Memorial Investors, Ltd. v. RTC (In re 5300 Memorial Investors, Ltd.)*, 973 F.2d 1160, 1163-64 (5th Cir. 1992); *RTC v. McCrory*, 951 F.2d 68, 71 (5th Cir.), *cert. denied*, 113 S. Ct. 459 (1992). *But see In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332, 1342-44 (1st Cir. 1992). However the conflict between the circuits regarding the time for asserting the special defenses may be resolved, there is simply no authority to support the assertion by the FDIC that its appointment as receiver is, by itself, a reason to set aside a judgment for punitive damages signed before insolvency.

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2. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

3. 12 U.S.C.A. § 1823(e) (West 1989).

4. Of course, the issue raised by Taylor's Petition is not whether the FDIC, as a postjudgment intervenor, can raise its epecial defenses on appeal. The issue is, instead, whether the FDIC's status as a federal agency changes the rule that the net worth of the receivership estate is fixed as of the time the receiver is appointed subject to the receiver's right to litigate claims.

CONCLUSION

For the reasons set forth in the Petition for Certiorari and in this Brief, the award of punitive damages in favor of Suzan E. Taylor d/b/a Exploration Services should be reinstated.

Respectfully submitted,

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